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In the Supreme Court of the United States

No. 630
OCTOBER TERM, 1970.

ALEX SHONDOR BIRNS,
Petitioner,

vs.

E. P. PERINI,
Superintendent, Marion Correctional Institution,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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E. P. PERINI,

Superintendent, Marion Correctional Institution,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner, Alex Shondor Birns, prays that a writ of certiorari issue to review the judgment and final order of the United States Court of Appeals, for the Sixth Circuit, made herein on June 5, 1970, which judgment affirmed the denial of petitioner's quest for a writ of habeas corpus in the United States District Court for the Northern District of Ohio.

OPINIONS OF THE COURTS BELOW.

The original opinion in this cause was rendered by the Federal District Court (cited *Birns v. Perini*, ____ F. Supp. ____) and is attached hereto as Appendix B, *infra*, at page 53. Another opinion that was rendered by the state Court of Appeal, reported formally as *State v. Birns*, 10 Ohio App. 2d 103 (1967), is also attached. This state court's opinion is designated Appendix C, at page 71. The Ohio Supreme Court in denying further appellate review did not render an opinion. As indicated above the opinion and order by the Sixth Circuit Court of Appeals is designated in this petition as Appendix A, at page 43.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The judgment of the Court of Appeals having been rendered on June 4, 1970, the jurisdiction of this court is invoked under the provisions of Title 28, U.S.C., Sec. 1245, which pertinently provides that:

> "Cases in the Court of Appeals may be reviewed by the Supreme Court by the following methods:
>
> 1. By Writ of Certiorari granted upon petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

STATEMENT OF QUESTIONS INVOLVED.

1. Can evidence suppressed in one trial because of its acquisition in violation of the prohibition against illegal searches and seizures be admitted in a subsequent trial of the same person, for a different offense?

2. Is an accused deprived of a fair trial where he is repeatedly asked questions concerning collateral matters, which questions were not only deliberately designed to require him to invoke the privilege against self-incrimination, but were asked after specific notice to the prosecution that asking the questions would necessarily require the petitioner to rely on the privilege?

3. Where evidence beneficial to the accused is shown to have been willfully suppressed by the prosecution, can the Court fail to regard such suppression as a denial of due process and a fair trial?

4. In deciding whether the suppression of evidence is harmless error, is the apt test whether such would have affected the outcome of the case?

5. Where evidence surreptitiously acquired by electronic means, in violation of the Fourth and Fifth Amendments, was considered by the jury in arriving at a guilty verdict, must a new trial be ordered?

6. Was petitioner unconstitutionally prejudiced by the extensive publicity given the return of a federal indictment charging him with perjury, which publicity coincided with final summation to the jury in this case where the basic issue was one that involved his credibility as against the credibility of a policeman?

7. Where the trial prosecutor refers, in final argument, to the fact that the appellant had asserted the priv-

ilege against self-incrimination at the time of his arrest, can a resulting conviction be squared with the constitution?

8. Was the petitioner convicted in the absence of any evidence whatever on one or more essential elements of the crime charged?

CONSTITUTIONAL AND STATUTORY PROVISIONS WHICH THE CASE INVOLVES.

Constitution of the United States, Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Constitution of the United States, Amendment V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Constitution of the United States,
Amendment XIV, Section I:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws."

STATEMENT OF THE CASE.[1]

On July 23, 1964, Alex Shondor Birns, the petitioner in this case, and one Keeling were arrested at 5715 Brookpark Road in Parma, Ohio. An indictment for promoting a numbers game stemmed from the arrest (R. 671), hereafter called the first case. The indictment in the first case was returned on July 28, 1964 (R. 669), and it (C.P. No. 80,677) was still pending on November 23, 1964 (R. 669), when the events relevant to this conviction (hereafter referred to as the second case) occurred. A motion to suppress the evidence in the first case on the ground of illegal acquisition was granted on October 26, 1965, *State v. Birns and Keeling,* C.P. No. 80,677.[2] The trial here in-

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[1] Whenever reference is made in this petition to the record in the trial court it will be preceded by the prefix "R." When the record on the Motion For A New Trial on the basis of newly discovered evidence is involved the prefix will be "NTR." References to the Appendix in the Court of Appeals are designated (App. p. ____).

[2] The ruling on that motion in the first case stood and still stands undisturbed. The State's motion for reconsideration (R. 671) was denied on January 31, 1966, *State v. Birns and Keeling, ibid.*

volved (*i.e.* in the second case) did not begin until December 7, 1965.

The trial in the second case resulted in Birn's conviction on two counts. These, in the vernacular, were bribery and witness tampering (R.C. of Ohio, §§ 2917.01 and 2917.07). The convictions rested on an allegedly incriminating conversation and exchange of money between appellant and a Parma Detective, Clarence Bennett, at the Beef and Bottle Restaurant in Parma, Ohio. (R. 106-107, 153, 191, 193, 621-622, 705-708, 1247.) Corroboration was claimed by another Parma law officer, one Frank Eschweiler, who said he monitored the crucial conversation by radio.[3] The transmission was accomplished, it is claimed, by way of a transmitter concealed on the person of Detective Bennett and recorded through an open microphone on a tape recorder. (R. 84-88, 156-157, 165, 169-171).

Early in this trial of the second case the State began to refer to various aspects of the first case including the evidence which had been suppressed.[4]

The ploy began with a view of premises involved in the first case (R. 20-23, 26), continued in opening statement and was maintained, unabated, through final argument where part or all of 12 pages of transcript were used to dilate upon the first case. (R. 892-895, 971-972, 975-

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[3] Eschweiler conceded considerable interference (R. 284), including police calls on the same receiver (R. 254), and admitted "editing" the parts he thought unimportant (R. 254) by turning the recorder on and off (R. 245, 254, 283, 288-290). See p. 8, *infra*, for a discussion of yet another interference—a collision between the monitoring car and another automobile.

[4] The defense objected early, vigorously and permanently to any reference to the gambling charge beyond the introduction of the indictment. (R. 23, 26-30, 38-40, 624-629, 634-635, 876-879.) The objection was renewed on motion for a new trial. (R. 1049 et seq. 1211-1214, 1223.) The point was saved on appeal.

978, 987, 989, 990.) During the taking of evidence, the Court allowed extensive testimony about the nature of the numbers racket and the petitioner's alleged relationship to it (R. 623-641), including descriptions relating to physical items suppressed in the first case, *State v. Birns et al.*, C.P. No. 80,677 (R. 639), growing out of the raid and illegal seizure on July 23, 1964. This was done over the Petitioner's objections and motions for mistrial. (R. 624-629, 631, 634, 635, 638, 640, 876, 878-879.)

In addition to permitting testimony related to suppressed materials and to an accusation not laid in the indictment in the second case, the trial court assisted the prosecution effort by permitting the jury to view the premises at 5715 Brookpark Road, the scene of the arrest in the first case, over defense objection (R. 23, 26-27, 29-30). The view also included (properly) the areas in the Beef and Bottle Restaurant, the scene of the crucial events in the case on trial (the second case). The order allowing "the view" referred *only* to "the place." To this *only* the defense agreed (R. 22). The defense did not anticipate and was not told of the Brookpark site view until just before it was proposed. The defense promptly objected by telephone and in the record on the return to court. (R. 23, 26-27, 29-30.) The objection was overruled. (R. 27.)

Detective Eschweiler was a key witness in the second case against the Petitioner. His testimony and related matters covered approximately one hundred and twenty-nine pages. (R. 239-322, 478-524.) The evidence he gave corroborated that of the other principal state witness, Detective Clarence Bennett. Bennett told of an allegedly incriminating conversation between Birns and him while at dinner at the Beef & Bottle Restaurant in Parma, Eschweiler testified that he clearly heard the conversation between the Petitioner and Bennett over a radio receiver

in his private car parked near the restaurant. (R. 244-249, 262.) This was so, Eschweiler said, even though the tape he was making with an open microphone and recorder in his automobile came out too garbled on the tape for much to be audible.[5] On triai he (Eschweiler) said:

> "I had the tape reporder on and off *throughout the duration of the conversation.*" (R. 245.) (Emphasis supplied.) (Cf. NTR 53-54.)

A defense objection on the ground that the answer was not responsive resulted in the striking of the quoted material. (R. 245.)[6] Regardless of this strike, other and further testimony by Detective Eschweiler clearly implied constant auditory surveillance of the conversation. (See R. 244-245; 254; 289-290; 492; 510; Cf. NTR 59-60; 62-64; 70-71.)

Eschweiler also testified at the trial that he had told:

> "Everything of relevance to this case, yes, I have.
> Q. Everything?
> A. Yes, sir.
> Q. There is nothing more?
> A. Not that I can recall." (R. 290.)

Nowhere does the Eschweiler testimony mention that his car was struck by another, nor that his vehicle was damaged, that he was out of his automobile at all during

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[5] See R. 476 for a distinguishable passage verifying the Petitioner's version of the colloquy (R. 476). This case illustrates one of the vices of electronic surveillance. If the tape is clear and incriminating, it is used against the accused. If it is not clear, or exculpatory material is wiped out by tampering, then the auditor's oral corroboration is available. The State has it either way where the recording is not made with a jack and cord directly connecting the receiver and the tape recorder. Although Petitioner Birns demanded and received access to the tape when he learned of the recording (R. 127-128, 711), its garbled condition availed him nothing.

[6] But it retains status as a statement contradicting later testimony during the hearing on the motion for new trial.

the crucial interval or that any other police officer was on the scene outside the restaurant during the monitoring (see R. 239-332, 478-524). Eschweiler concedes this (NTR 50-51). Nor was information in his and Bennett's combined reports (State Ex. 9 and 10—received as Def's NT Ex. 6 and 7, NTR 184) even though the second combined report was *made* because the first was insufficiently detailed. Eschweiler testified at the trial on the merits that the first report (State Ex. 9, Def's NT Ex. 6) was a statement "regarding all the events" of the incident (R. 485, 487-492: NTR 64-67, 70-71; cf. NTR 83-84) but State Ex. 10 (Def's NT Ex. 7) was "more detailed." (R. 492.) That his car was struck by another during the monitoring interval was confirmed by three witnesses and their affidavits supported and corroborated in part by a police report[7] from the Parma Police Department [Def's Ex. B, C, D and E (1) and (2) attached to motion for new trial on newly discovered evidence] describing a collision on the evening of November 23, 1964, between a parked vehicle owned by Frank W. Eschweiler and an automobile driven by Donald E. Hale, one of the witnesses.

Both Detective Bennett and Detective Eschweiler testified that the collision information was conveyed to the prosecutors in charge of the case. (NTR 51-52, 82, 190.) No one claims that disclosure to the defense was made on trial (cf. NTR 50-51; see also entire transcript of trial testimony).

This point on the suppression of the collision information was saved by a motion for new trial based on newly discovered evidence and on appeal.

It became apparent during the trial Petitioner would be compelled to assert the privilege against self-incrimina-

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[7] Acquired after the affiants first made the fact of the collision known to the Petitioner.

tion if the prosecution persisted in questions concerning the defendant's income. The prosecution was so advised side bar in the presence of the court and out of the presence of the jury. Such action was necessary because a federal grand jury was then engaged in an investigation of the petitioner's income. (R. 719-727.) Nevertheless, the prosecution asked the questions over and over again. The court refused to interfere although requested to do so. (R. 719, 725-726-727, 727-732, 799, 803-804, 814, 884.)

The Petitioner Birns and his difficulties with the law were given extensive attention in all the news media before and during his trial on the charges in the instant case. [See Def's Exhibits (Motion for New Trial) 1 A-R; 2 A-JJJ; 3 A-R; 4; 5; 6 A-S; 7 A-11; and 8 A-DD.] The jury was not sequestered during this interval and was repeatedly given faulty admonitions. (Cf. R. 11-12, 198, 237-238, cf. R. 382, 495, 524, 571, 727, 840.)

Based on this evidence Birns, the petitioner, was convicted and sentenced to prison. On appeal to the Ohio Court of Appeals, this conviction was affirmed. See *State v. Birns,* 10 Ohio App. 2d 103 (1967). The Supreme Court of Ohio refused further appellate review and the United States Supreme Court denied Certiorari in *Birns v. Ohio,* 389 U.S. 1038 (1968), rehearing denied 390 U.S. 753 (1968).

With the state remedies having been exhausted Petitioner then sought a writ of habeas corpus, which action was filed in the District Court for the Northern District of Ohio. This action was originally considered on the basis of the Petition (App. p. 2), the Return (App. p. 9), and the Traverse (App. p. 12).

The trial judge next ordered petitioner to file with the court the transcripts of testimony (*i.e.,* Bill of Exceptions) in the various trials involved in this case. These were, in

order, the transcript of the testimony in the trial of *State v. Keeling and Birns,* which case resulted in the suppression of the evidence contended to have been improperly used to obtain petitioner's conviction in this case. The transcript for the state court trial in this case, and the transcript of the lengthy hearing had on the basis of Appellant's Motion For A New Trial on the basis of newly discovered evidence. Thus it was that the District Court stated that "all of the factual material involved in the petition was fully developed in these several thousand pages" of records (*infra,* p. 55).

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT.

I. Can evidence suppressed in one trial because of its acquisition in violation of the prohibition against illegal searches and seizures be admitted in a subsequent trial?

The petitioner and one Edward Keeling, as co-defendants, were indicted on July 28, 1964, for allegedly promoting a numbers game. This case was styled *State v. Birns and Keeling,* and was numbered 80677, in the Cuyahoga County Common Pleas Court. While the indictment in the above case was still pending when the events in this case occurred, a Motion to Suppress certain evidence that had been illegally seized in the *Birns and Keeling* case had been granted. This occurred on October 26, 1965, and, it was on December 7, 1965, that trial in the case, to which this petition is directed, was had.

Despite the existence of the order suppressing such evidence, the trial court, *over objections,* allowed extensive testimony by a police officer involved in this search. Significant here, in this testimony the officer described the

suppressed items, their function as related to the numbers game, the background of the search; as well as, observations made of the appellant and his activity at the time. Included in this testimony was the officer's speculation as to the contents of a bag petitioner was seen carrying on the day of this arrest.

In addition to this, the trial judge allowed the jury to view the premises where the search had been made, and the Court allowed extensive argument as to the subject of the numbers' raid, the manner in which the game is promoted; as well as, petitioner's alleged connection therewith.

Since *Mapp v. Ohio,* 367 U.S. 643 (1961), it has been settled constitutional principle that evidence acquired in violation of the Fourth Amendment is amenable to a timely motion to suppress in state trials. The rule is not that the product of an illegal search should not be used in a particular way "but that it should not be used at all." *Silverthorne Lumber Company v. United States,* 251 U.S. 385, 392 (1920). Any derivative of the illegal search is proscribed, *Wong Sun v. United States,* 371 U.S. 471, 486-487, 487-488 (1963). And federal standards for the application of Fourth Amendment rights set the minimal requirements for the states, *Ker v. California,* 374 U.S. 23 (1963).

To be sure, the use at issue here is in a setting different from any Petitioner's research has discovered. Stated another way, the setting here shows evidence suppressed in the one case was admitted over objection in a subsequent or second case. However, if the evidence in the first case can be transported to, and used in, the second case, the policy determined by the constitutional standards of *Mapp v. Ohio, supra,* is defeated. This Court, then, should prevent this heretofore successful, albeit flagrant, circum-

vention of that policy and grant the writ herein being sought.

In short, the position here being taken is that the Motion to Suppress having been granted precluded such evidence, as was suppressed from being admissible, for any purpose in any trial or hearing. In this regard, see *Rea v. United States,* 350 U.S. 214 (1950), where the facts show a federal narcotics agent obtained evidence in the course of an illegal search and seizure. After this evidence was suppressed in federal court, the agent sought to testify as to the same facts in a state court prosecution. The Court held he could be properly enjoined from testifying.

A comparable situation exists here. The evidence testified to by the officer was specifically suppressed (in the case of *State v. Birns and Keeling, supra*); yet, the trial court in this trial permitted this suppressed evidence to be presented as part of the State's case.

Thus, we contend here that inasmuch as it had been determined, by virtue of the granted Motion to Suppress (in the *Birns and Keeling* case), that the police were unlawfully on the premises, anything that was seized, or even seen, incident thereto could not be testified to. See *McDonald v. United States,* 335 U.S. 451. Also see *McGinnis v. United States,* 227 F.2d 598 (1st Cir., 1955), where the Court, in addressing itself to this question held that testimony as to what a searching officer observed during an illegal search must be excluded.

In his analysis of this first issue the District Court recognized that "evidence seized in a search consists not only of tangible items collected and received from the premises, but includes those items observed by these conducting the search" (*infra,* p. 58). Yet, the Court held that the unauthorized view, by the jury, of the premises where this illegal arrest occurred was harmless error

(App. p. 18) since none of the evidence introduced in the bribery trial bore upon the physical arrangement of the premises. The rejoinder of this must be that quite obviously the prosecutor and the judge must have felt the view had some value otherwise they would not have authorized it especially in face of petitioner's objections (App. pp. 33-35).

In further justifying the use of illegal evidence—here, proof that Birns and Keeling were arrested and the illegal property seized, the Court reasoned that proof that one was arrested can be shown in spite of the fact that such arrest may have previously been declared illegal, if the crime for which such arrest qualifies to prove motive or intent to commit the crime then on trial (*infra*, p. 59).

Next, the District Court in rationalizing to the conclusion that this evidence was properly admitted set forth the following premises: *First*, "the exclusionary rule was derived as a deterrent to offensive police practices." *Secondly*, that while "there is admittedly a deterrent effect in applying the rule in all criminal cases [this] * * * effect is greatest in those cases where the search was had for the purpose of gathering evidence for the crime charged," and that the "deterrent effect is at best minimal where [as he felt was the case here] the only connection between the search and the crime charged is pure accident" (*infra*, p. 60). Thus it was from these premises the Court concluded that since "the deterrent effect to be gained by suppressing the evidence gained by the search is so minimal under the peculiar circumstances of a case of witness tampering * * * the rule should not be applied" (*infra*, p. 60).

In our view, and in all deference to the district judge, his reasoning is fallacious—and for a number of reasons. It is fallacious in the first instance because based on de-

fective major premises. Simply put, the exclusionary rule, to repeat, according to Justice Holmes, speaking for the Court in *Silverthorne v. United States, supra,* decrees that illegally acquired evidence "should not be used at all." Hence, it was illogical for the Court to structure his syllogism on a premise that suggests the exclusionary rule does not apply full strength in all criminal cases.

The Court's reasoning is also fallacious because it is a *non sequitur.* This is so because the Court's conclusion does not follow from the premises cited. Here reference is being made to the court's conclusion that "the deterrent effect [of the exclusion rule] is at best minimal where the only connection between the search and the crime charged is pure accident" (*infra,* p. 60). The fallacy in this is emphasized by the point that the deterrent aspect of the exclusionary rule is strengthened by its application across the board, and is not concerned about the deterrent effect in the case in which it is being applied.

In our view, therefore, the District Court's innovative exceptions to the exclusionary rule, which exceptions have been given express approval by the Court of Appeals (*infra,* p. 47), should be nipped in the bud by this Court.

II. Is an accused deprived of a fair trial where he is repeatedly asked questions deliberately designed to require him to invoke the privilege against self-incrimination after specific notice to the prosecution that asking the questions would necessarily require the petitioner to rely on the privilege?

It became apparent during the trial that petitioner would, if compelled, assert the privilege against self-incrimination if the prosecution persisted in asking questions concerning his income and other activities unrelated to the case he was defending. Both the prosecution and

the court were advised that a Federal Grand Jury was then engaged in and investigation of the petitioner's income (R. 719-727). Despite this, the prosecution continuously and repeatedly asked such questions, and the Court adamantly refused to interfere although specifically requested to do so (R. 719, 725, 726-727, 727-732, 799, 803, 804, 814, 884).

This situation differs only in detail from one in which a prosecution insists upon putting a witness on the stand after he has noticed that he (the witness) will assert the privilege. Such prosecutorial conduct constitutes gross bad faith and is highly prejudicial to any defendant.

In *United States v. Maloney,* 262 F.2d 535, 537-538 (2d Cir., 1959), the prosecution called a witness knowing he would assert the privilege. In reversing the conviction, the Court stated (*id.*, at 537) the controlling principle to be:

> "When a witness claims his privilege, a natural, indeed an almost inevitable, inference arises as to what would have been his answer if he had not refused. If the prosecution knows when it puts the question that he will claim the privilege it is charged with notice of the probable effect of his refusal upon the jury's mind."

The Court of Appeals in commenting on this issue, resolved, on the basis of the sterile conclusion that petitioner only invoked the privilege "relatively few times," and that in any event petitioner had made the inquiry relevant when he took the stand "knowing that he might be asked questions with reference to which he would want to invoke the privilege" (*infra,* p. 50).

The obvious fallacy in the above conclusion is that the petitioner could only anticipate that he would be queried about matters that were relevant. Hence, it can-

not be said that his income was relevant to whether or not he bribed the officer. Not only this, the Court's expressed notion comes close to being a holding that a prosecutor can, even by his inquiry into collateral matters, make relevant that which is clearly irrelevant. This view seems to be at odds with the rule that the answer of a witness under cross examination to a question not relevant to the issue is conclusive on the party cross examining, a rule that applies with equal vigor to an accused when he is being examined.

Still another important aspect of coerced invocation concerns both the right of confrontation and the privilege against self-incrimination.

The right to confrontation is established by the Sixth Amendment to the Constitution of the United States. Judicial construction has placed the right squarely within the Fourteenth Amendment's due process requirements. *Pointer v. Texas,* 380 U.S. 400, 403 (1965); *Douglas v. Alabama,* 380 U.S. 415, 419 (1965). So construed the right is applicable to state trials.[8]

The right to confrontation includes as a primary element the right to cross-examine, *Douglas v. Alabama,* 380 U.S. 415, 418 (1965). In the latter case a prosecutor put on a convicted defendant (who had been tried separately from the defendant Douglas) and by using the convicted man's confession forced him to assert the privilege repeatedly[9] as the prosecutor questioned him on the details of the confession. A considerably damning case was thus made against Douglas. This procedure, it was claimed, denied Douglas his right of confrontation. Finding that the prosecutor's use of the confession "might well have been" the equivalent of testimony in the jurors'

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[8] See also Ohio Constitution, Article I, Section 10.

[9] An appeal was pending.

minds, and that the witness' reliance on the privilege *might* lead the jury to believe that the confession had been made and was true the Supreme Court of the United States held that cross-examination[10] and confrontation had been denied (p. 420):

> "The alleged statements clearly bore on a fundamental part of the State's case against the petitioner. The circumstances are therefore such that 'inferences from a witness' refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant.'" (Citing cases.)

The present case poses only a refinement of the *Douglas* proposition. This defendant was deliberately asked questions about his income, after being warned against it, to force him to invoke the privilege. In so doing inferences added "critical weight" to the prosecution's case in a form "not subject to cross-examination and thus unfairly prejudiced the defendant."

A further aspect of the forced invocation needs emphasis here.[11] *Griffin v. California,* 380 U.S. 609, 613 (1965) establishes that a state prosecutor's comment on a defendant's failure to testify violates the Fifth Amendment. Characterizing the comment on the refusal to testify, the Court said:

> "It is in substance a rule of evidence that allows the State the privilege of tendering to the jury for its consideration the failure of the accused to testify. No formal offer of proof is made as in other situations; but the prosecutor's comment and the court's

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[10] See also Ohio Constitution, Article I, Section 10.

[11] The privilege incorporated in the Fifth Amendment to the United States Constitution is now applicable to the states through the Fourteenth, *Malloy v. Hogan,* 378 U.S. 1 (1964); *Murphy v. Waterfront Comm'n.,* 378 U.S. 52 (1964).

acquiescence are the equivalent of an offer of evidence and its acceptance."

There is the same equivalence when the prosecution deliberately forces an accused to claim the privilege and the court overrules the defense objection. Such an "offer of evidence" is, obviously, not subject to cross-examination and, equally obviously, it invites inferences of guilt,[12] causes the defendant to testify against himself, and penalizes the exercise of a constitutional right. What could be more deleterious to due process than questions deliberately aimed at forcing the claim of constitutional privilege for the express purpose of penalizing the defendant because he avails himself of his constitutional right? See *Griffin v. California,* 380 U.S. 609, 613-614 (1965).

The District Court's observations, on the above argument, projects from the assertion that "the trial court evidently believed * * * [Birns] had by his answers opened the door to questions about his income, but had not waived the protection of the privilege," and that petitioner had only invoked the privilege "nine times," as though such were relevant circumstances. As was argued in the Application for a Certificate of Probable Cause (App. p. 31, footnote):

"Any contention that petitioner *opened the door* to queries about his income must falter in face of the showing (See footnote 12, of Court's opinion) that it was on cross examination he was asked about his

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[12] It is an elemental proposition that no such inference is *legally justified.* Many cases have so held and this is an obvious, implicit element in the rationale of *Griffin v. California, ibid.* How else could it be a "protection to the innocent"? It is wrong to "conceive of it as merely a shield for the guilty." *Quinn v. United States,* 349 U.S. 155, 161-162, 164 (1955). No particular form of words is required to invoke the privilege. *Quinn v. United States,* at pp. 162-163. However, it is almost axiomatic that laymen (*e.g.,* jurors) equate the assertion with derogatory inferences.

income. Hence, the question must be did prosecutor's cross examination about a purely collateral matter properly "open the door" to those questions that invoked the use of the privilege. Stated another way, can the improper cross examination of petitioner—that is, as to collateral matters—be excused even though the sole purpose of such examination was to generate prejudice by requiring the invocation of the self incrimination privilege. See *United States v. Aqueci,* 310 F.2d 817, 839-840 (2d Cir. 1962).

In our view, the action of the prosecutor in this case in deliberately forcing the invocation of the Fifth Amendment was inspired by willful desire to achieve the end that it did—that is, deprive the accused of a fair trial.

III. Where evidence beneficial to the accused is suppressed, can the court fail to regard such suppression as a denial of due process and a fair trial?

IV. In deciding whether the suppression of evidence is harmless error, is the apt test whether such would have affected the outcome of the case?

Detective Eschweiler, who testified he had monitored the conversation, in which the alleged bribery was committed, failed to disclose that this car had been hit by another car during this crucial interval. Nor was it disclosed that he was outside of this car, and away from the receiver for some time. *Three defense witnesses placed Eschweiler outside the car for more than one-half hour.* Significant here, both Detectives Eschweiler and Bennett (the allegedly bribed officer) testified they conveyed this information to the prosecutors who tried petitioner's case.

It was not until long after the verdict in this case that the existence of this suppressed evidence was uncovered. Hence, it was only brought out in the hearing

on a new trial motion based on newly discovered evidence.

Obviously, the credibility of the police officer would have been seriously impeached both by the fact that information was suppressed (a condition potentially creating a wide gap in the State's corroborative proof) and the fact of the suppression itself. And a constitutional right is infringed when the matter denied or suppressed goes to the credibility of a witness. Thus, in *Napue v. Illinois,* 360 U.S. 264 (1959), it was said at 269-270:

> "The principle that a state may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, * * * does not cease to apply merely because the *false testimony goes only to the credibility of the witness.* The jury's estimate of the truthfulness and reliability of a given witness *may well be determinative of guilt or innocence* and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend."

As stated by the New York Court of Appeals in a case very similar to this one, *People v. Savvides,* 1 N.Y.2d 554, 557; 136 N.E.2d 853, 854-855; 154 N.Y.S.2d 884, 887:

> "*It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt.* A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the District Attorney has the responsibility and duty to correct what he knows to be false and elicit the truth * * * That the District Attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair." [13]

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[13] " 'The cruelest lies are often told in silence.' " *Barbee v. Warden,* 331 F.2d 842 (4th Cir. 1964).

The material suppressed here involved corroborative evidence, which so enmeshed with direct evidence that *it certainly cannot be said* "beyond a reasonable doubt" that it would not have affected the jury's "estimate of the truthfulness and reliability" of the witness. Nor can it be said it would not "have been determinative of guilt of innocence." *Napue v. Illinois, supra.* Also see *Coleman v. Maxwell,* 273 F. Supp. 275 (S.D. Ohio, 1967). Compare *Williams v. Dutton,* 400 Fed. 797 (5th Cir., 1968).

The state Court of Appeals, in addressing itself to the question generated by these facts, stated:

> "The [trial] court, in overruling defendant's motion for a new trial on the ground of newly discovered evidence, stated the facts, as it found them to be if presented to the jury, would not within reasonable probability cause the jury to come to a different result. The credible evidence on the collision as shown by the record, clearly supports such a result" (*infra,* pp. 78-79).

The statement just quoted not only demonstrates the failure to apply the required test for the effect of a federal constitutional violation as set forth in *Chapman v. California,* 386 U.S. 18 (1967), it shows the affirmative application of a contravening standard. Since the Supreme Court established *Chapman* as the rule marking a minimum standard for the administration of justice, federal courts are required to intervene "when the standard appears to have been misapprehended or grossly misapplied." *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 491 (1951).

Viewed from another posture, the state courts resolution of this question really begs it. For, it must be remembered that while an accused is not entitled to a perfect trial, he is entitled to have the fact trier weigh the

witnesses' credibility. This principle is overtaxed by the forced conclusion that if proof of the collision had been presented it was not *within reasonable probability* that such could have caused the jury to come to a different result, since "the credible evidence on collision * * * *clearly supports* such a result" (Emphasis added). What this cryptic entry means is the state courts reasoned, from the conflicting evidence present that the officer was only out of the car for the time he said he was, and that appellant's evidence was not credible. Surely such reasoning offends the proper test which seeks to determine what the effect would have been on the minds of the jurors, not on the Court's mind. See *Katteakos v. United States,* 328 U.S., at 764.

So viewed, it is here submitted that, in the total setting of this case, it is most unlikely that had the evidence of the collision been available to the defense its use would have had no effect on the jury. In short then, if petitioner was absolutely entitled, as this Court found, to any advantage he could have created by use of evidence showing Eschweiler was not at his listening post during the entire time he says he was, then violence has been done his right to a fair trial. This wrong, to be sure, is magnified, if excused on the basis of an *ad hoc* determination by the state courts that they regard the testimony of one of these wrongdoers as the only *credible evidence* and the testimony of several disinterested citizens unworthy of belief.

This analysis, we contend, supports our own thesis that had the *Chapman* standard been properly used by the state court the conviction would have been reversed in that court.

The District Court, on the other hand, as was proper, agreed that there was suppression of evidence. He characterized such as being *unpardonable* (*infra,* p. 67). De-

spite this correct finding, the Court then concluded that such suppression was harmless.

In making this judgment, the Court expressly refused to consider whether the state courts had applied the correct federal test in assaying the effect of this constitutional impropriety in petitioner's conviction (*infra*, p. 68). Even despite this failure it is submitted that the test applied by the District Court in drawing his conclusions, cannot be verified for the following reasons. *First*, the conclusion drawn by the Court presupposes that had the defense (as it had every right to) be permitted to show, or otherwise develop, the fact that the witness who supported the officer allegedly bribed, was not at his listening post during a significant phase of the conversation, such fact could not have been put to any beneficial use by the defense. *Secondly*, it assumes that had the jury known of the suppressed facts they would not have credited petitioner's story any more than they did.

In our view, it is not enough for a court to intimate as this Court did, that had he been one of the jurors, and the suppressed evidence had been properly disclosed, his verdict would not have been different. This conclusion seems inappropriate. For, the accused was entitled to have the jury (made up of his peers) weigh the credibility of all the witnesses in the light of all the facts, including the witnesses' failure to mention—and the prosecutor's failure to disclose—relevant facts bearing on the case.

Thus, we contend that the harmless error doctrine is misapplied when it defers to the assertion, apparent from the district judge's opinion, that because he (as a judge) would not have been persuaded by certain crucial facts, not even one juror could have been even slightly influenced by it. In making this observation, it is, of course, significant that the Supreme Court did state in *Katteakos*

v. United States, 328 U.S. at 764 (1946), that the apt test, in these situations, must be "what effect the error had upon the jury's decision. The crucial thing is the impact of the thing done wrong in the minds of other men, not one's own [not even the Court's], in the total setting."

Be all that as it may, the Court of Appeals, in rejecting our position concluded that our reliance on *Napue v. Illinois,* 360 U.S. 264, was misplaced because (1) *Napue* "was not concerned with failure to disclose evidence of value to the accused" (*infra,* p. 48), and (2) that in any event there was no false testimony given in this case as was the case there (*Ibid*).

Of course, one can only say that there was no false testimony given here if they ignore the fact, as the Court of Appeals apparently did, that the State's witness deliberately, with the tacit approval of the prosecutor, created the *false* impression that he had monitored the *entire* conversation [(R. 245), (NTR 53-54), and (R. 290)]. Compare this situation with that in *Hamric v. Bailey,* 386 F.2d 30 (4th Cir.), where the Court held that evidence may be false either because it is perjured, or because it creates a false impression. This view seems to be at odds with that reached here.

The Court of Appeals was further of the opinion that this suppressed evidence was harmless, for the further reason that it had "no direct bearing on the guilt or innocence" of the petitioner (*infra,* at 49), in this regard it may suffice to simply note that this Court is yet to require such a bearing. Indeed, the thrust of this Court's decision in *Napue* seems to reject such a thesis.

V. Where evidence surreptitiously acquired by electronic means, in violation of the Fourth and Fifth Amendments, was considered by the jury in arriving at a guilty verdict, must a new trial be ordered?

The factual background for the above contention shows Detective Eschweiler testified he heard (on a radio receiver while in his car parked outside the restaurant) the crucial conversation appellant had with his Detective Bennett. This conversation, it was said, was being broadcast over a transmitter that had been secreted on Bennett's person. It was this conversation the State contended incriminated our petitioner.

Petitioner demanded the tape as soon as its existence became known to him (R. 127-128, 711) which demand was that it be produced for his inspection and use. This demand was made on the ground that a clear and honest tape would exculpate him. When the tape was played it proved to be so noisy and garbled as to, with one possible exception, be all but totally unintelligible. The possible exception (referred to above) is on passage where the following colloquy is heard:

> Detective Bennett: * * * "What I want to know is one thing, what do I have to do for this * * *?"
>
> Petitioner Birns: "Nothing, I said." (R. 476, cf. R. 407.)

In fully assaying the cogency of the contention here being made, this Court should recognize petitioner's motion to suppress both the tape and Eschweiler's testimony relative to this conversation, was made upon a specific reservation of the right to make it (R. 7, 441-444). On the other hand, one of the specific grounds was the false representation to the Court that a reproduction was the original tape, which representation was made in the pres-

ence of Detective Bennett who had actual knowledge of its falsity. (R. 203, 312-313, 611, 613, 619-620.)

This circumstance may again be urged, by respondent, as support for the untenable conclusion that petitioner opened the door to the corroborating testimony of Detective Eschweiler by demanding the tapes and getting them. Of course, the confutation of this proposition is drawn from the fact that petitioner could not know in advance what Eschweiler would say, and therefore, was unaware until Eschweiler had testified that his evidence required rebuttal. Thus, it was that by the time it became known such rebuttal was required the knowledge that the only rebutting agent, the tape, was garbled was also in hand.

In addition to this, in the absence of the *Katz* decision (—that is, *Katz v. United States,* 389 U.S. 147, which was rendered while petitioner's case was on direct appeal) the defense could not know an attack upon the product of this warrantless electronic search could be made on the basis of the circumstances present here. The specific circumstances here being referred to is the fact that antecedent justification cannot be shown for the officers' action. But this is no bar to the assertion of this as a contention here. This is so because the failure to assert a constitutional proposition unripe at the time of first notice of the facts that make it available does not foreclose assertion when, at last, the principle is announced. See *Curtis Publishing Company v. Butts,* 388 U.S. 130, 142-146 (1967).

Thus, we contend here that Detective Eschweiler's testimony was an electronic product acquired in violation of the Fourth, Fifth and Fourteenth Amendments and that his testimony, which corroborated that of Bennett's, obviously led to petitioner's conviction—the illegal restraint in this case.

The same conclusion is warranted with respect to the testimony of the Witness Detective Bennett who carried on the face-to-face conversation with the petitioner, while wired and geared for broadcasting—again without antecedent justification by a neutral magistrate.

To do otherwise than suppress this testimony allows the police the best of two possible worlds. If the tape supports them, the victim is scientifically shut out of a rebuttal. Should the tape not verify the police or be garbled, as here, then the eavesdropper's "remembered" product of the illegal acquisition is used to convict. An electronic search can become a monstrous weapon if the yield is not accurately and clearly preserved and made available to both sides without an alternative product (*i.e.*, oral testimony) available to the State should the recording be faulty. Whether the fault is deliberate or not is immaterial.

By way of further argument, it must be noted that there is a definite conflict in the circuits (compare *United States v. White,* 405 F.2d 838, [7th Cir. 1-7-69], certiorari granted April 7, 1969, with *United States v. Kaufer,* 406 F.2d 550, [2d Cir. 1/14/69]).

In *United States v. White,* cited above, the position taken by the Court was that *Katz* administered the *coup de grace* to *On Lee v. United States,* 343 U.S. 747 (1952), the authority by which the use of the type of electronic searches here involved had been approved. As the Seventh Circuit Court saw it: the elimination of the trespass doctrine present in *Olmstead*[14] and *Goldman*[15] cases forming "the bulwark which had provided the conceptual basis for *On Lee*" requires that a "defendant's private conversation, intercepted by the government's clandestine ac-

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[14] *Olmstead v. United States,* 277 U.S. 438 (1928).

[15] *Goldman v. United States,* 316 U.S. 129 (1942).

tivity * * * without prior judicial control must be held as per se inadmissible evidence if the language of *Katz* is literally applied." (*United States v. White, supra.*)

In *Kaufer,* on the other hand, the Second Circuit read *Katz* as being applicable only where the electronic surveillance was performed without the knowledge of any of the participants in the intercepted conversation.

The District Court, in resolving this issue, took the position that *Desist v. United States,* 394 U.S. 244 (1969) aborted our contention for a direct application of *Katz.* In our judgment, the restriction imposed on *Katz* by *Desist* is only part of the answer. Left unanswered is the relationship of *Berger v. New York,* 388 U.S. 41 (1967), which tends to say that the requirement of probable cause to indulge in certain types of eavesdropping (See *e.g., Silverman v. United States,* 365 U.S. 505 [1961] and *Clinton v. Virginia,* 377 U.S. 158 [1964]), calls for an application of the fundamental Fourth Amendment principle as developed from *Mapp v. Ohio,* 367 U.S. 643 (1961) and *Linkletter v. Walker,* 381 U.S. 618 (1965).

In our view, until this possibility is appropriately resolved by this Court the issue raised by this contention must be deemed alive.

VI. Was petitioner unconstitutionally prejudiced by the extensive publicity given the return of a federal indictment charging him with perjury, which publicity coincided with final summation to the jury in this case where the basic issue was one that involved his credibility as against the credibility of a policeman?

Both petitioner, who was regarded as a police figure, and his trial were given extensive attention by the news media. The most damaging of his publicity, which was given banner headlines by the press was the return of a

federal indictment against him for perjury. Significant here, these publications were made after the case had been argued to the jury. Of these, the most prejudicial was what appeared in the Cleveland Press. There the headline read:

"U. S. Grand Jury Indicts Shondor Birns"

A two-column head proclaimed:

"Perjury Is Charged by U. S. on Shondor Birns' Income Tax"

After this soak of publicity in the midst of argument, the jury got the case on December 23, 1965, and, understandably given the circumstances, returned a verdict of guilty on two counts. The deliberations took only part of an afternoon—a relatively short time considering the length of the trial and the complexity of the evidence.

The Court will note that publicity given the federal perjury indictment was especially prejudicial because a principal issue in the instant case was Birns' credibility. That credibility had to be weighed against the policemen's. This was done within a few hours of the time the jury was immersed in news of charges of perjury against Petitioner Birns. The claim here is not *just* that there was an accumulation of prejudicial publicity. It is that *plus* **the timing of the news of petitioner's federal indictment for perjury.**

State court due process must now meet a minimum federal constitutional standard, cf. *Ker v. California,* 374 U.S. 23 (1963). The cases which are discussed below will demonstrate the federal rule and certainly they teach that a comparable timing of a state indictment during a federal trial would warrant a new trial. The state systems should be no less sensitive to due process when federal action prejudices the rights of a defendant. Indeed, the

defense contention here is that the Due Process Clause of the Constitution of the United States requires "such sensitivity to meet the fair trial standard."

Nearly forty years ago one of Ohio's most respected jurists sounded the note (in speaking of judicial bias) which is the theme of this subsection:

> "Every procedure which would offer a possible temptation to the average man * * * to forget the burden of proof required to convict * * * or which might lead him not to hold the balance nice, clear and true between the state and the accused, denied * * * due process of law." [16] [Taft, J. in *Tumey v. Ohio,* 273 U.S. 510, 532 (1927).]

There has never been, and can never be, an exception to the requirement of fair trial so long as the Constitution stands. Thus, Mr. Justice Black, speaking for the Court, said *In Re Murchison,* 349 U.S. 133, 136 (1955):

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness * * * to perform its high function in the best way 'justice must satisfy the appearance of justice.'" *Offut v. United States,* 348 U.S. 11, 14.

The jury must be composed of a panel of impartial and "indifferent" jurors. *Irvine v. Dowd,* 366 U.S. 717, 722 (1961). And the shaping of the indifferent is not to come from outside sources. See *Maryland v. Baltimore Radio Show,* 338 U.S. 912, 920 (1950) (Opinion on denial of certiorari).

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[16] Prejudiced publicity affects fair trial, i.e., due process, and cannot be waived. It may be attacked at any time. Cf. *People v. Billingsley* (App. Ct. Ill. 2nd Dist.), 213 N.E. 2nd 765, 769-770 (1966).

"Proceedings for the determination of guilt or innocence in open court before a jury are not in competition with any other means for establishing the charge." (Frankfurter, J.)

Justice Holmes put it this way:

"The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court and not by any outside influence whether of private talk or public print." *Patterson v. Colorado,* 205 U.S. 454 (1907).

See *Rideau v. Louisiana,* 373 U.S. 723 (1963). (Intrusion in the judging function found from community circumstances—television broadcast interview from the jail—"without pausing to examine a particularized transcript of the voir dire examination of the members of the jury, * * *"

In *Meyer v. Cadwalader,* 49 F. 32, 36 (Cir. Ct. E.D. Pa. 1891), a federal court found "good ground" for setting aside a verdict without direct evidence to show that a jury read newspaper articles calculated to prejudice the jury against the plaintiffs in a civil case. (Early and late publicity. But after early motion for withdrawal of juror no further motion made. There was no obligation [cf. *Delaney v. United States,* 199 F.2nd 107 (Cir. 1, 1952) to renew objections].) The *Meyer* court realistically evaluated the situation:

"It is idle to say that there is no direct evidence to show that the jury read these articles. They appeared in the daily issue of leading journals, and were scattered and broadcast over the community. The jury separated at the close of each session of the court, and it is incredible that, going out into the community, they did not see and read these newspaper publications. That these published statements were well calculated to prejudice the jury against the plaintiffs

> and deprive them of a fair trial is a proposition so plain that it would be a sheer waste of time to discuss it. Good ground, therefore, here appears for setting aside the verdict."

The *Meyer* case was quoted with approval in reversing a judgment and granted a new trial after adverse newspaper publicity reciting statements by the prosecuting attorney. This was done in the face of the claim that there was no direct evidence that the jury read the newspaper reports. *Griffin v. United States,* 295 F. 437, 440-441 (Cir. 3, 1924).

It is of no consequence that jurors do not admit having seen or heard derogatory publicity. In *Henslee v. United States,* 246 F.2d 190 (Cir. 5, 1957), a case in close factual parallel to the instant case, the court asked the jury whether any of them had seen widespread publicity about a motion filed by the district attorney in a civil case containing derogatory information about the defendant whose criminal trial was practically completed at the time. No juror responded that he had. The judgment of conviction was reversed and the case remanded for a new trial. At page 193, the Fifth Circuit said:

> "Where, as here, unwanted publicity resulted from action taken by the Assistant United States Attorney in connection with something entirely apart from the proper conduct of the trial, however innocent he may have been of any willful purpose to influence the jury, a much higher standard prevails."
>
> * * * * *
>
> "Without in any way imputing an improper motive to the prosecuting officer here, we do find that in the proper conduct of the affairs of his office it should have been apparent that for him to file this motion with the inclusion of the self-serving and irrelevant statements of offenses and crimes not comprehended in the indictment for which Henslee was on trial

> might well produce the highly unfortunate publicity that actually resulted. His failure to apprehend the natural result of his act *is as damaging to the cause of justice as if he had failed in his duty to act with scrupulous regard for fairness.*" (Emphasis supplied.)

See *U. S. v. Milanovich,* 303 F.2nd 626, 629 (Cir. 4, 1962), where it was said that the burden is upon the government to demonstrate that jurors have not been adversely affected by publicity occurring after the jury is sworn. If an officer of the court is implicated in the dissemination of such information, the occurrence requires special scrutiny. *Holmes v. U. S.,* 284 F.2nd 716, 718 (Cir. 4, 1960); *Massicot v. U. S.,* 254 F.2nd 58, 62-63 (Cir. 5, 1958); cf. *Janko v. U. S.,* 281 F.2nd 156, 169-170 (Cir. 8, 1960).

And see *Marshall v. United States,* 360 U.S. 310, 312-313 (1959), where jurors were exposed to news articles that could not be directly offered as evidence. It was held that notwithstanding their affirmations that they would not be influenced by the articles, a new trial would be granted:

> "The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is part of the prosecution's evidence. Cf. *Michaelson v. United States,* 335 U.S. 469, 475. It may indeed be greater for it is then not tempered by protective procedures."

In *Briggs v. United States,* 221 F.2nd 636 (Cir. 6, 1955), the judge below issued bench warrants charging witnesses for the government with perjury (for failure to testify in accordance with previous statements given to the FBI) while the trial was in progress. In the instant case Birns was charged with perjury while the trial was

in progress, and the charge was widely publicized. Reversing the conviction and granting a new trial this Court adopted the *Meyer v. Cadwalader* position on lack of necessity for direct evidence, in holding counsel did not waive his rights in declining to question the jurors about seeing or reading the articles (a motion for mistrial was pending and denied). Continuing, this Court quoted from its previous decision in *Stone v. United States,* 113 F.2nd 70, 77 that:

> " 'The question is, not whether any wrong resulted * * * under the circumstances related, but whether it created a condition from which prejudice might arise or from which the general public would suspect that the jury might be influenced to reach a verdict on the ground of bias or prejudice.' "

In accord with this Caesar's wife approach is *Harrison v. United States,* 200 F. 662, 669 (Cir. 6, 1912), where the publication in a newspaper of a post office fraud order involving defendant while he was on trial was held to be a circumstance making a fair trial impossible and justifying a new trial. That the occurrence was an "unfortunate coincidence" and "beyond the control of the trial judge" did not salvage the defendant's right to a fair trial.

In the present case the jury had heard part of the argument when the culminating publicity that Petitioner had been indicted for perjury on three counts occurred. It was a particularly impropitious time to interrogate, if emphasis was to be avoided (see *Briggs v. United States,* 221 F. 2nd 636 [Cir. 6, 1955]), or to ask for a renewed admonition even if that ritual were considered effective to eliminate prejudice. This is so, because, as has been said before:

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury * * * all

practicing lawyers know to be unmitigated fiction." [17] Jackson, J., concurring in *Krulewitch v. United States,* 336 U.S. 440, 453 (1949).

To be sure the prosecutor could not have offered the indictment as evidence. Nevertheless the jury can be presumed from the headlines to have had the information. Thus it is significant here that the Supreme Court, in addressing itself to a comparable situation, declared:

> "When such events take place in the courtroom, defendant's counsel can meet them with evidence, arguments, and requests for instructions, and can at least preserve his objections on the record."
>
> "When neither counsel nor court can control the admission of evidence if unproven, and probably unprovable, * * * [information is] put before the jury by newspapers and radio. Rights of the defendant to be confronted by witnesses against him and to cross-examine them are thereby circumvented * * *." See concurring opinion *Shepherd v. Florida,* 341 U.S. 50, 51 (1951).

In addition, this further argument can be made—that is, since the very recent case of *Pointer v. Texas,* 380 U.S. 400 (1965) brought the right of confrontation within the Fourteenth Amendment, the publicity in this case defeated that right.

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[17] Cf. the remarks of Judge Hubert L. Will in *Free Press v. . air Trial,* 12 De Paul Law Review 197, 207 (1963).

VII. Where the trial prosecutor refers, in final argument, to the fact that the petitioner had asserted the privilege against self-incrimination at the time of his arrest, can a resulting conviction be squared with the Constitution?

In his final argument, counsel for the state, in his usual unrestrained (See *Broeckel v. Green,* 298 F. Supp. 249 (N.D. Ohio, 1967)) fashion argued:

> "The testimony from Detective Eschweiler is that he and Lieutenant King made an effort to interrogate the defendant after he had been arrested, and they asked him some questions and they told him that he didn't have to say anything if he didn't want to, that was his constitutional right. He told them, then, 'I don't want to say anything until I see my lawyer, and I was sitting there eating in the restaurant alone.' "
>
> "We know that was a lie, and he told this lie in the face of his own personal knowledge that Detective Eschweiler was there asking the questions, knew that he was there, because he saw him there when he came over, and Detective Bennett said, 'Frank, are you here?' Never once when he took that witness stand did he put on any rebuttal evidence that he didn't say it." (R. 984.)

Here the prosecution succeeded in using the assertion of a constitutional privilege as evidence against the petitioner. Granted, *Griffin v. California,* 380 U.S. 609 (1965), only prevents such comment when it relates to a defendant's failure to take the stand on trial. However, for equally cogent reasons the Fifth and Fourteenth Amendments are violated by a comment on the assertion of the privilege at any point in the arrest procedure. *Gillison v. U. S.,* 399 F.2d 586 (D.C. Cir. 1968).

We start here with the premise that while the prosecutor "may prosecute with earnestness and vigor—indeed

he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. Hence, it is as much his duty to refrain from improper methods calculated to produce wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. United States,* 295 U.S. 78 (1935).

Thus, in this brief, the contention is being made that the prosecutor's argument, in which he deliberately commented on the petitioner's assertion of his right of silence when arrested and the branding of a statement allegedly made by him at that time a lie, was so grossly prejudicial that it deprived petitioner of a fair trial within the meaning of the due process clauses.

Specifically, as to the prosecutor's argument, in which he stated that Birns had chosen not to say anything until he saw a lawyer, it is our contention this argument was willfully designed to persuade the jury to draw an unfavorable inference from the exercise of a constitutional privilege. In assailing this prosecutorial tactic, it cannot be denied that upon being arrested, petitioner was no more obligated to try his case in the restaurant at the point of his arrest, than he was when he was questioned at the station. His rights included reserving his defense for presentation during the orderly procedures that one has in our county, and even then such defense is only required when the prosecutor's proof alone could sustain a conviction.

This idea is further buttressed by the fact that being under arrest he was entitled to rely, as he did on his right of silence (*Escobedo v. Illinois,* 378 U.S. 478) with the full assurance that no unfavorable inferences could be drawn therefrom (*Griffin v. California,* 380 U.S. 609 and *O'Connor v. Ohio,* 385 U.S. 92).

As structured above, it is at once apparent that by the prosecutor's argument he compromised basic constitutional rights that had been exercised by an accused. Consider in this regard, *United States ex rel. Smith v. Brierly,* 384 F.2d 992 (3d Cir., 1967). The *Brierly* case involved facts showing the accused, in face of verbal accusation made in his presence, had refused to say anything. His action in clenching his fist and nodding his head in response to these statements were admitted as evidence against him. In the opinion, the Court of Appeals approved language to the effect that "to draw a derogatory inference from mere silence is to compel the * * * [accused] to testify." From this it was concluded that by virtue of this device, the rights of the accused were violated.

The position here being taken is likewise consistent with that in *Brierly.* For it is most illogical to argue that if it is improper to present evidence showing the exercise of the privilege, it is not more so improper to argue to the jury that such right was exercised.

VIII. Was the petitioner convicted in the absence of any evidence whatever on one or more essential elements of the crime charged?

Certain facts are undisputed. When Petitioner physically turned over the $200 to Detective Bennett, *nothing* was said suggesting any untoward attempt to influence him in his duties. The only statement even arguably incriminating ("Look, if you can be helpful O.K.") was spoken *subsequently* and in response to Bennett's prodding.

In an Ohio prosecution for bribery, the State must establish beyond a reasonable doubt:

(1) the giving corruptly

(2) of anything of value

(3) to a public officer to influence him in the discharge of his public duty, and

(4) *such thing of value must have been given intentionally for such purpose. State v. Moore*, 78 OLA 380, 150 N.E.2nd 323 (1958).

Since *no* evidence was adduced proving the existence of the fourth of the elements [which in turn lends challenge to the existence of the other three], the verdict could only have been based on speculation and conjecture. The only other conceivable explanation for the jury's action is that, contrary to law, it gave a retrospective application to Petitioner's single allegedly suspect remark.

To have been entitled to a conviction, the prosecution was required to establish by evidence beyond a reasonable doubt *each* essential element of the crime as charged. *State v. Miclau*, 167 Ohio St. 38, 146 N.E.2nd 293 (1958); *State v. Martin*, 164 Ohio St. 54, 128 N.E.2nd 7 (1955); *State v. Snyder*, 157 Ohio St. 15, 104 N.E.2nd 169 (1952). No defendant in a criminal action can be constitutionally convicted on general principles or mere suspicion.

It is here contended that the ultimate question of law presented here is precisely the one at issue in *Thompson v. Louisville*, 362 U.S. 199 (1960), *i.e.*:

> "Whether the charges against Petitioner were so totally devoid of evidentiary support as to render his conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment. Decision of this question turns not on the sufficiency of the evidence, but on *whether this conviction rests upon any evidence at all.*" (Emphasis added.)

The upshot of our contention here is precisely this. First, we do not contend the conviction is not supported

by sufficient evidence. The conviction is not supported by an evidence that a bribe was ever attempted. Such being the case, the propriety of this conviction raises questions of constitutional dimensions under the principles of *Thompson v. Louisville,* 362 U.S. 199 (1960) and *Garner v. Louisiana,* 368 U.S. 157 (1961).

In this case, as in *Thompson* and *Garner,* no evidence can be pointed to as support for the required conclusion that the charge made was proved. Our contention, in this regard, is based on the fact that nowhere in the record does it appear that the petitioner did any of the things proscribed by the statute he was convicted of violating.

CONCLUSION.

The constitutional infirmities argued in this petition have, as is apparent, not been given equal treatment. The reason for this is, of course, not to be taken as an indication that the relative strength of each contention should be weighted by the attention devoted to it in the brief. Nor, in this same regard, should the Court reason that the additional emphasis given to only a few of these in this conclusion suggest counsel regards them as the strongest. Yet, it must be said that the contentions that petitioner's conversation was illegally monitored, the fact that beneficial evidence was suppressed, and that illegally acquired evidence was admitted, appear to be the most flagrant.

As to the admission of suppressed evidence, there can be no other conclusion except that it was wrong. The same is true of prosecution's willful suppression of beneficial evidence. And, of course, the conflict in the circuits as to the legality of illegally monitored conversations, the most that can be said by anyone is that the issue will be eventually resolved.

What all of this means in this case, is that whether standing alone, or in concert with other valid contentions, constitutional infirmities exist in this conviction. And for this reason, it should be voided.

RELIEF.

For the foregoing reasons it is therefore respectfully requested that a writ of certiorari be issued under the seal of this Court to the United States Court of Appeals for the Sixth Circuit to the end that the judgment of that Court may be reviewed and reversed.

Respectfully submitted,

JAMES R. WILLIS, ESQ.,
Attorney for Petitioner.

APPENDIX A.

OPINION AND JUDGMENT OF THE COURT OF APPEALS.

No. 19790

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

ALEX SHONDOR BIRNS,
Petitioner-Appellant,

v.

E. P. PERINI,
Superintendent, Marion Correctional Institution,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Ohio, Western Division.

(Decided and Filed June 5, 1970.)

Before: PECK, McCREE and COMBS, Circuit Judges.

PECK, Circuit Judge. Appellant was convicted in the state court of bribery and witness tampering. His conviction was affirmed by the Ohio Court of Appeals, and the Supreme Court of Ohio dismissed his appeal for want of a substantial constitutional question. His writ of certiorari to the United States Supreme Court was subsequently denied.

Appellant brought the present habeas corpus action in the District Court and it denied his writ without an evidentiary hearing after reviewing the transcripts and exhibits from the various proceedings held in the state courts. After an extended discussion of the ten issues presented in support of the writ the District Court found no basis for relief. This appeal followed.

The record sets forth these pertinent facts. On July 23, 1964, appellant was arrested after a raid and the police found numbers slips in his possession. An indictment was returned and on a motion to suppress evidence by appellant, the state court granted the motion because of a lack of probable cause for issuing the search warrant. This proceeding is hereinafter referred to as the "numbers case."

Thereafter, on November 20, 1964, appellant met a police officer, Bennett, in a restaurant and they arranged to meet there later. Police Officer Bennett had participated in the earlier numbers case raid. The meeting occurred on November 23, and Bennett had a transmitter on his person and another officer, Eschweiler, had a receiver and a tape recorder in his car outside the restaurant. During the course of discussion in the restaurant, appellant gave Bennett $200 and said it was a Christmas present for his wife and children. Bennett and Eschweiler testified that appellant wanted some information concerning the numbers case against him. At a prearranged signal, Eschweiler came into the restaurant and arrested appellant.

After the trial, appellant sought a new trial based on newly discovered evidence. The motion was denied. The evidence, known by the prosecutor at trial but undisclosed to appellant, was that Eschweiler, while monitoring the conversation of appellant and Bennett, was involved in an auto accident and was absent from his auto for a period of time. Eschweiler was a corroborating witness for the State.

Appellant sets out nine grounds for relief on his appeal to this Court. We have reviewed all of them and find that none of the grounds provide a basis upon which the writ can be granted. We, however, do find that several of appellant's contentions merit discussion.

The first of these is that evidence suppressed in the numbers case was improperly admitted in this trial for bribery and that it was error for the trial court in the bribery case to allow the jury to view the premises where the appellant was arrested in the numbers case. Appellant states that the trial court allowed extensive testimony by a police officer involved in the search concerning the suppressed items, their functions, and the background of the search. The police officer is not named, so it is unclear as to which of the several officers appellant is referring to here. We assume that appellant refers to the testimony of Police Officer Denver who testified for the State as an expert in numbers operations. The District Court addressed itself to the testimony of Police Officer Bennett. We will consider the testimony of both of these witnesses. The State contends that the testimony concerning the raid was proper in that it established a motive for the alleged bribe, and further that it was the appellant who first elicited testimony from Bennett concerning the suppressed evidence, and it merely stepped through the open door to clarify the matter.

Appellant's contention is that under the exclusion rule, illegally acquired evidence should not be used at all.[1] *Silverthorne v. United States,* 251 U.S. 385 (1920). The State contends that in certain limited situations, as in this case and in *Walder v. United States,* 347 U.S. 62 (1954), previously suppressed material can be introduced in another trial. In *Walder,* the Court held that the prosecutor was permitted to contradict the untrue statements made by the defendant on direct examination by using

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[1] This includes both physical objects illegally taken and the introduction of testimony concerning objects illegally observed. *Williams v. United States,* 263 F.2d 487, 489 (D.C. Cir. 1959), *cert. denied,* 365 U.S. 836 (1961); *McGinnis v. United States,* 227 F.2d 598, 603 (1st Cir. 1955).

for impeachment purposes on cross-examination evidence that was not directly related to the offense charged and which had been seized in violation of the Fourth Amendment. The Court distinguished the situation found in *Agnello v. United States,* 269 U.S. 20 (1925), where on cross-examination of the defendant the government sought to introduce suppressed evidence to discredit him. In *Agnello* the Court stated that the suppressed evidence was not admissible in rebuttal since the defendant did not testify about this evidence on direct and that "he did nothing to waive his constitutional protection or to justify cross-examination in respect of the evidence claimed to have been obtained by the search." 269 U.S. at 35.

The exclusionary rule concerning the use of suppressed evidence is without application when the defendant either waives his protection under the rule or is in some manner estopped from objecting to its use. We note that this is not the usual case where the suppressed evidence was introduced for the purpose of proving the crime for which the search was conducted, but rather, the testimony concerning the suppressed evidence was used in a case dealing with another crime. This suppressed evidence was also not directly related to the guilt or innocence of appellant on the charge of bribery.

The State contends that it used testimony of the raid in the numbers case for the purpose of showing a motive for the alleged bribe. Appellant's position is that nothing more than the introduction of the indictment in the numbers case was necessary for this part of the State's case. The trial court stated that something beyond the indictment was needed to show the participation of Police Officer Bennett in that raid because the charge relating to bribery stemmed from the numbers case, and that it "at-

tempted to maintain a fine line without retrying the numbers case." The District Court found, and we agree, that the State could not have proved its case without a reference to the raid and to the numbers case.

Appellant's objection to the testimony of Police Officer Denver concerning the operation of the numbers game is not well founded. The Ohio Court of Appeals found that this testimony was proper under the circumstances when it stated:

> "Such property [the suppressed evidence] was not offered or received in evidence in this case. There is no doubt but that Birns brought into the case the matter of his involvement in numbers operations so that evidence as to the manner in which such a lottery is operated was clearly proper." *State v. Birns*, 10 O. App. 2d 103, 109 (1967).

The District Court found that the more offensive testimony concerning the suppressed evidence came from Officer Bennett. On direct examination, Bennett was not questioned concerning what was observed or what was seized, but he did state, in answer to a question, that the raid took place and that the evidence was gathered. The State did not inquire further regarding these matters. Appellant was the first to elicit testimony from Bennett concerning the suppressed materials of the raid in the numbers case, and as found by the District Court, the State quickly stepped through the open door. The State contends that it merely clarified the matter for the enlightenment of the jury after appellant initiated inquiry of this matter. The function of the exclusionary rule is to protect the appellant and to prohibit the prosecution from introducing evidence obtained in an illegal search and seizure, but when, as here, the appellant chose to open inquiry of suppressed matters on cross-examination of the State's

witness Bennett, he cannot be heard to complain that the State pursued it. We find that it was proper under the circumstances for the State to use Bennett's testimony to rebut that which was brought out on cross-examination by the appellant.

The District Court stated that the view of the premises where the numbers operation was raided by the police could be considered to be the admission of evidence. The Court went on to say that if there was error in allowing this view of the premises, it was harmless error under *Chapman v. California,* 386 U.S. 18 (1967), since none of the evidence introduced bore upon the physical arrangement of the premises. The state trial court charged the jury that the view was not evidence. We agree with the District Court that if there was any error in permitting the jury to view the premises, it was harmless error.

Appellant's next contention is that the State suppressed evidence beneficial to him when it failed to disclose Eschweiler's involvement in an automobile accident which caused him to be absent from his car while he was monitoring the conversation between appellant and Bennett. The District Court found that the prosecutor at trial did know of the accident and failed to either disclose this fact to the appellant or to offer evidence concerning it. By this suppression, appellant contends that his constitutional rights were infringed, even though it only goes to the credibility of a witness (*Napue v. Illinois,* 360 U.S. 264 (1959)), and he argues further that the state courts failed to apply the proper test for the effect of a federal constitutional violation as set forth in *Chapman.*

Appellant's reliance on *Napue* is misplaced since that case was not concerned with the failure to disclose evidence of value to the accused, but dealt with a situation

where the prosecutor knowingly failed to correct false testimony of a state witness.[2] In the present case, there was no false testimony given.[3] We likewise do not have before us a case where the prosecutor has concealed direct evidence bearing on the crime by failing to disclose to the defense the existence of a witness that would have been beneficial to the accused in his defense. *See, e.g., Lessard v. Dickson,* 394 F.2d 88 (9th Cir. 1968); *United States v. Wilkins,* 326 F.2d 135 (2d Cir. 1964). The District Court accepted, as we do, the State's contention that Eschweiler merely corroborated Bennett's testimony, and that he testified only to what he heard of the conversation which was the discussion concerning the alleged $200 bribe and appellant's request for help from Bennett in the numbers case. It is further apparent that Eschweiler's absence from the auto had no direct bearing on the guilt or innocence of the appellant since the suppressed matter could only be used to impeach the testimony of this corroborating witness. Further, and more importantly, appellant's own testimony concerning the events that took place in the restaurant while he was with Bennett is in substantial agreement with the testimony of Bennett and Eschweiler (*State v. Birns,* 10 O. App. 2d at 110), and it is here concluded that in the absence of any claim of dis-

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[2] The Supreme Court in *Giles v. Maryland,* 386 U.S. 66, 74 (1967), declined to rule on the extent of the prosecutor's constitutional duty to disclose all evidence admissible and useful to the defense, and on the degree of prejudice necessary for a granting of a new trial.

[3] The District Court found that Officer Eschweiler did not commit perjury since he was never asked whether he heard the whole conversation or whether he left the car, and that Eschweiler testified only as to what he had heard. The State's evidence was that Eschweiler was absent from his listening post for only five or ten minutes, so that little of the conversation was missed. Appellant contended that his witnesses placed Eschweiler outside his auto for over thirty minutes.

crepancy the failure to disclose Eschweiler's absence from his listening post was "harmless beyond a reasonable doubt." *Chapman, supra.*

The final issue to be considered deals with appellant's contention that he was denied a fair trial when he was asked certain questions by the State on cross-examination. Appellant contends that these questions were designed to require him to invoke the privilege against self-incrimination, since the State was on notice that asking such questions would cause appellant to rely on the privilege. At the time of appellant's trial for bribery, the Federal Grand Jury was engaged in an investigation of possible income tax violations by him. The District Court found that the questions complained of were relevant,[4] and that the trial court apparently believed that appellant had by his answers opened the door to questions as to his income, but had not waived the protection of the privilege.

The District Court held that the asking of these questions by the State was not constitutional error. The Court supported its conclusion by noting that petitioner invoked the privilege relatively few times; petitioner by his testimony made the subject relevant; and petitioner took the stand knowing that he might be asked questions with reference to which he would want to invoke the privilege.

Appellant contends that this situation differs only in form from that in which the prosecution puts a witness on the stand after having notice that the witness would assert his privilege, and relies on *United States v. Maloney,*

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[4] On cross-examination these two exchanges took place:

"Q. Do you have any source of employment or financial income other than Port Wellington Quarries at the present time?

"A. That is it."

* * *

"Q. The quarries, and nothing else?

"A. That is correct."

262 F.2d 535 (2d Cir. 1959). There the government attempted to build its case on inferences from the use of the privilege and the Court held that this conduct constituted reversible error. The Court found that the answers sought would have corroborated the testimony of the government's principal witness, and that the government knew that two of the three witnesses called would refuse to answer. The Court stated that the government's summation was in such a context that it could have been understood only as arguing that if the witness had not refused to answer, the answer would have been in the affirmative, and that "[s]uch refusals [to testify] have been uniformly held not to be a permissible basis for inferring what would have been the answer, although logically they are very persuasive." 262 F.2d at 537. Of like import is *United States v. Compton*, 365 F.2d 1, 4 (6th Cir.), *cert. denied*, 385 U.S. 956 (1966).

We do not consider *Maloney* and *Compton* to be in point, and decline to extend their doctrine beyond the orbit of their facts. We find that, unlike the *Maloney* and *Compton* situations, there was not any "conscious and flagrant" attempt by the State to build its case out of inferences arising from the use of the privilege and that any inference from appellant's refusal to answer did not add "critical weight" to the State's case.[5] We further find that the questions objected to by the appellant did not amount to a deliberate attempt by the State to cause appellant to invoke the privilege and hold that the District Court was correct in finding no constitutional error that deprived appellant of his right to a fair trial.

Affirmed.

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[5] See *Namet v. United States*, 373 U.S. 179, 186-187 (1963), where the Supreme Court discusses *Maloney* and these two factors which suggest error. See also *United States v. Tucker*, 267 F.2d 212, 215 (3d Cir. 1959).

JUDGMENT OF THE COURT OF APPEALS.

(Entered June 5, 1970.)

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Respondent-Appellee recover from Petitioner-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

APPENDIX B.

OPINION OF THE DISTRICT COURT.

No. 68-313.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO,
WESTERN DIVISION.

ALEX SHONDOR BIRNS,

Petitioner,

vs.

E. P. PERINI,
Superintendent, Marion Correctional Institution,
Marion, Ohio,

Respondent.

OPINION OF DISTRICT COURT.

(Filed June 16, 1969.)

YOUNG, *J:*

This cause came to be heard on petition for a writ of habeas corpus. The allegations of the petition are:

(1) Evidence suppressed because of its acquisition in violation of the Fourth and Fourteenth Amendments of the United States Constitution was admitted on the trial resulting in the convictions in issue here;

(2) The use of the suppressed evidence as described in (1), in effect, resulted in petitioner being tried and convicted on a charge not laid against him;

(3) A police officer sat mute while the prosecutor represented to the court that the tape containing alleged incriminatory conversations between petitioner and an-

other policeman was an original, when the mute officer was fully aware that the tape was not an original;

(4) Petitioner was repeatedly asked questions designed to require him to invoke the privilege against self-incrimination after specific notice to the prosecution that asking the questions would necessarily require petitioner to rely on the privilege;

(5) The prosecutor referred, in final argument, to the fact that petitioner had asserted the privilege against self-incrimination at the time of his arrest;

(6) The return of a federal indictment of petitioner for perjury was accompanied by extensive publicity which coincided with the final summation to the jury in the case in which the present convictions were secured, and in which a basic issue was his credibility as against the credibility of a policeman;

(7) A police officer allegedly monitoring an incriminating conversation between petitioner and another officer suppressed the fact that his car had been struck by another automobile during the period of surveillance and that this accident required his absence away from the monitoring equipment;

(8) The trial court applied the "preponderance of evidence" or "reasonable probability" test to an error of "constitutional dimension" rather than the "beyond a reasonable doubt" standard;

(9) Petitioner was convicted in the absence of any evidence whatever on one or more essential elements of the crimes charged;

(10) Evidence surreptitiously acquired by electronic means, in violation of the Fourth and Fifth Amendments, was considered by the jury that convicted the defendant.

Petitioner was convicted by a jury on two counts of bribery on December 22, 1965.[1] He appealed to the court of appeals which affirmed the conviction. *State v. Birns,* 10 Ohio App. 2d 103, 226 N.E.2d 149 (1967). An appeal was taken from this decision to the Supreme Court of Ohio. That court dismissed the appeal for want of a substantial constitutional question. A petition for a writ of certiorari was filed with the Supreme Court of the United States. This was denied *sub nom Birns v. Ohio,* 389 U.S. 1038, *rehearing denied,* 390 U.S. 975 (1968). All of the issues raised in the petition were raised on appeal. Therefore, petitioner has exhausted his available state remedies within the meaning of 28 U.S.C. § 2254(b). There having been exhaustion, this Court will take cognizance of the claims presented.

In considering this matter the Court has been favored with copies of the transcripts in petitioner's trial, the motion for a new trial on the basis of newly discovered evidence and the motion to suppress evidence in the case of *State v. Keeling and Birns,* (Ct. C.P. Cuyahoga County No. 80,677, 1965). All of the factual material involved in the petition was fully developed in these several thousand pages. The Court has also been able to consider all of the exhibits in the various proceedings. For these reasons there is no necessity of holding an evidentiary hearing. *Humphries v. Green,* 397 F.2d 67 (1968).

On July 23, 1964, officers of the Cleveland and Parma police forces armed with a search warrant raided the premises at 5717 Brookpark Road, Parma, Ohio. As a result of this raid, petitioner and one Edward Keeling were arrested and a certain amount of hand written material, al-

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[1] There is some confusion as to the date of the conviction. This Court will accept the date shown on the journal entry signed by the presiding judge.

leged to be betting slips, was seized. Detective Bennett of the Parma police participated in the raid as a photographer and was a potential witness in any trial on the matter.

On November 20, 1964, Detective Bennett encountered petitioner in an establishment known as the Beef & Bottle Club. A conversation ensued. Petitioner offered to prove to the detective that the *Cleveland Press* actually aided the numbers games on the east side of Cleveland by printing in a prominent place in the east side edition the clearinghouse numbers. The west side edition, while carrying the same information, printed it in a much less prominent place. Detective Bennett accepted the offer. The entire encounter was related to his chief.

Petitioner phoned Detective Bennett on November 23, 1964. A meeting was arranged for eight o'clock that evening at the Beef & Bottle. Detective Bennett under instructions of his chief obtained a Fargo transmitter and receiver and a tape recorder. Then accompanied by Detective Eschweiler, assembled the apparatus and proceeded to the meeting.

The apparatus which was employed consisted of a transmitter hidden on the person of Detective Bennett, a microphone hidden in Detective Bennett's tie clip, a receiver in Detective Eschweiler's car and a tape recorder recording the transmissions received in Detective Eschweiler's car.

The meeting occurred as arranged. After the subject of the gambling information in the *Cleveland Press* had been discussed, the conversation turned to the subject of Detective Bennett's meager salary. Petitioner placed $200.00 on the table and said something about a Christmas present for the detective's wife and children. Upon a

pre-arranged signal Detective Eschweiler entered the restaurant and arrested both Detective Bennett and petitioner.

At various times during the two conversations, petitioner had inquired of Detective Bennett the name of the individual hired to examine the handwriting on the betting slips, suggested that he, petitioner, had a "pipeline" into the F.B.I., urged the detective to "wheel and deal," and suggested that it was useless to attempt to suppress gambling. After the money had been placed on the table, Detective Bennett inquired of petitioner what was desired in return for this. Initially, the petitioner hesitated, then after some conversation and a repeated inquiry, petitioner suggested that if Detective Bennett would be helpful, it would be appreciated.

The matter of the gambling raid was considered on a motion to suppress evidence on October 18, 1965. After a prolonged hearing, the court determined that there had not been probable cause for the issuance of the search warrant. The motion to suppress was granted.

The instant case was tried in December of 1965 and the jury returned a verdict of guilty. Thereafter it was learned that Detective Eschweiler's car had been involved in an accident during the time that he was monitoring the conversation between the petitioner and Detective Bennett. This fact had not been adduced at trial. A motion for new trial was filed based upon this newly discovered evidence. This motion was denied.

The first two allegations of the petition concern the admission in this case of evidence suppressed in the matter of *State v. Keeling and Birns,* (Ct. C.P. Cuyahoga County #80,677, 1965). It is petitioner's contention that the exclusionary rule enunciated in *Weeks v. United*

States, 232 U.S. 383 (1914) and *Silverthorn Lumber Co. v. United States,* 251 U.S. 385 (1920) and made expressly applicable to the states by *Mapp v. Ohio,* 367 U.S. 643 (1961), prohibits the introduction of evidence seized by an unlawful search in any criminal case for any purpose.

The evidence seized in a search consists not only of the tangible items collected and removed from the premises, but includes those items observed by those conducting the search. *McGinnis v. United States,* 227 F.2d 598 (1st Cir. 1955).[2] A view of the premises could be considered to be the admission of evidence. The jury in this case was permitted to view the premises at 5717 Brookpark Road. Assuming arguendo that this was error, it was harmless error since it is clear beyond a reasonable doubt, that this view did not influence the jury in its final decision since none of the evidence introduced bore upon the physical arrangement of the premises. *Chapman v. California,* 386 U.S. 18 (1967).[3]

During the trial certain of the witnesses were examined regarding the raid on the premises at 5717 Brookpark Road. Unquestionably the prosecution could not have proved a case without reference to this raid. The first witness for the prosecution, Detective Bennett, testified that he had participated in the raid, and that petitioner was arrested on a charge of operating a gambling establishment. The detective was not questioned concerning what was observed or what was seized. During the course of his direct testimony this exchange did occur:

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[2] "We find no basis for distinguishing between the introduction into evidence of physical objects illegally taken and the introduction of testimony concerning objects illegally observed. * * *" 227 F.2d at 603.

[3] The trial court adhered to the position that the view was not evidence and so charged the jury. (R. 21, 1026.)

Q. All right. After this arrest was made, what, if anything, did you and these other officers do?

A. Gathered the evidence and took it to the Parma police station; Also Mr. Birns and Mr. Keeling. (R. 74-75).

The prosecution did not inquire further regarding these matters. It was petitioner who first questioned concerning this subject matter. (R. 130-131). The state quickly stepped through the open door. (R. 229-230).

The Ohio rule regarding the admission of evidence of other crimes is clear.[4] Evidence such as that admitted in this case can only be admitted under one or more of the exceptions engrafted on this rule. Among the exceptions, and applicable to this case, is admission to prove motive or intent. *Beckman v. State*, 122 Ohio St. 443, 5 N.E.2d 482 (1930); *Whiteman v. State*, 119 Ohio St. 285, 164 N.E. 51 (1928); *Farrer v. State*, 2 Ohio St. 54 (1853).[5] The reasoning and policy underlying these exceptions is applicable to the admission of the evidence in this case. Thus the evidence was properly admitted under the general rules of criminal evidence.

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[4] "The general rule of exclusion of proof of other crimes is founded on reasons which have stood the test of time. The prime reasons for the rule excluding testimony of collateral facts are that such evidence tends to draw away the minds of the jurors from the point in issue, and to excite prejudice, and mislead them, and that, moreover, the adverse party having had no notice of such a course of evidence, is not prepared to rebut it. The accused in fairness can only be expected to meet the accusations of the indictment, and is favored throughout with the presumption of innocence of even those accusations. Evidence which satisfies the jury beyond a reasonable doubt that defendant committed crimes other than the one alleged in the indictment does not warrant the jury, for that reason alone, in returning a verdict of guilty." 15 *Ohio Jur.* 2d, Criminal Law § 350 (1955).

[5] These exceptions have been codified in § 2945.59 of the Ohio Revised Code.

The exclusionary rule was derived as a deterrent to offensive police practices. It was felt that by preventing conviction on the basis of unlawfully obtained evidence the police would be forced to comply with the requisites of the Fourth and Fifth Amendments. The use of evidence so seized to gain a conviction for the crime of which the evidence is a representation is expressly condemned. *Mapp v. Ohio*, 367 U.S. 643 (1961); *Linkletter v. Walker*, 381 U.S. 618 (1965). Likewise the evidence derivative therefrom cannot be employed. *Wong Sun v. United States*, 371 U.S. 471 (1963). Although evidence so obtained can be used in most civil suits, *Sachler v. Sachler*, 15 N.Y.2d 40, 255 N.Y.S.2d 83, 203 N.E.2d 481 (1964), it cannot be employed in quasi-criminal cases. *United States v. Blank*, 261 F. Supp. 180 (N.D. Ohio 1966).

There is admittedly a deterrent effect in applying the rule in all criminal cases. The effect is greatest in those cases where the search was conducted for the purpose of gathering evidence for the crime charged. The effect is lesser, but still significant where the search was conducted to gather evidence of another crime, but evidence of the crime charged came to light during its conduct. The deterrent effect is at best minimal where the only connection between the search and the crime charged is pure accident.

When petitioner was arrested the police were operating under what they believed to be a valid search warrant. Petitioner himself must have believed that the warrant was valid or he would not be presently before this Court.

This Court is of the opinion that the deterrent effect to be gained by suppressing the evidence gained by the search is so minimal under the peculiar circumstances of a case of witness tampering such as this that the rule should not be applied. Therefore the evidence was proper-

ly admitted. Thus there is nothing in these allegations upon which relief can be granted.[6]

As his third basis for relief the petitioner alleges that Detective Bennett sat by and permitted a copy of the tape of the transaction between petitioner and Detective Bennett to be introduced as an original. This claim approaches the frivolous. When it appeared to the trial court that the tape was not the original, a thorough inquiry was instituted by the court, and the original was produced. The investigation by the court makes it clear that the matter was one of simple mistake. Detective Bennett simply assumed that since the prosecution had the original tape and the tape he was handed was marked original that it was the original without examining it closely. Actually it was a true copy and the jury was permitted to hear both the original and the copy and the entire situation was fully explained to the jury. In no manner was this prejudicial to petitioner.[7] Thus there is no basis in this allegation upon which the relief requested can be granted.

Petitioner has alleged that he was deliberately asked a series of questions which forced him to invoke the Fifth Amendment privilege against self-incrimination. (R. 719-33, 799-803).

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[6] The policy behind the exclusionary rule is strong, yet to apply it absolutely would create as much injustice as the rule prevents. This Court believes that the rule must admit of some small amount of flexibility. It would seem that in the situation where the connection between the police conduct and the crime with which the defendant is charged is mere accident or wholly a product of the defendant's own actions, the rule should be examined in light of the circumstances of each case to determine where the application would create a meaningful deterrent effect in that case. Only in those cases where such is found should the rule be applied.

[7] If the incident influenced the jury in any way it was against the prosecution for its ineptness.

The privilege against self-incrimination as guaranteed by the Fifth Amendment is made applicable to the states through the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1 (1964). The federal courts have developed two closely related theories applicable to this question. The first is that such constitutes misconduct on the part of the prosecutor and thus constitutes reversible error. *United States v. Tucker*, 267 F.2d 212 (3rd Cir. 1959). The second theory is that the questions and the inferences drawn from the refusal to answer place in evidence certain matters concerning which the defendant is denied the right of cross examination. *Frazier v. Cupp*, 37 L.W. 4362 (U.S. S. Ct., April 22, 1969); *United States v. Maloney*, 262 F.2d 535 (2d Cir. 1959) (L. Hand).[8] Under both theories the error can be cured by the court instructing the jury that no inference can be drawn from the invocation of the privilege. *Frazier v. Cupp, supra.* Both of these theories have been tacitly approved by the Supreme Court. *Namet v. United States*, 373 U.S. 179 (1963).[9] The Sixth Circuit has accepted the first of these theories. *United States v. Compton*, 365 F.2d 1 (6th Cir.), *cert. denied*, 385 U.S. 956 (1966).[10] This Court has the func-

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[8] This decision is actually grounded on both theories.

[9] The court's decision in *Douglas v. Alabama*, 380 U.S. 415 (1965) appears to strengthen the arguments for the denial of cross examination theory. The circumstances of that case are such that it would be difficult to rest the decision on the misconduct theory. The court does intimate that the action of the prosecution did approach misconduct. The opinion in *Bruton v. United States*, 391 U.S. 128 (1968) lends support for the employment of the denial of cross examination theory although the case is not directly applicable here.

In *Frazier v. Cupp*, 37 L.W. 4362 (U.S. S. Ct., April 22, 1969), the court grounded its decision on the denial of cross examination and implied that it approved of the conduct of the prosecutor.

[10] "Government counsel need not refrain from calling a witness whose attorney appears in court and advises court and coun-

(Continued on following page)

tion of determining whether the state complied with the constitutional requisites in gaining the conviction of petitioner.[11] The questions complained of were relevant.[12] The trial court evidently believed that petitioner had by his answers opened the door to questions as to his sources of income, but had not waived the protection of the privilege. (R. 724-25). Petitioner only invoked the privilege nine times during the course of his lengthy testimony.

The circumstances of this case are peculiar. This is the only case that the Court knows in which this question

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sel that the witness will claim his privilege and will not testify. However, to call such a witness, counsel must have an honest belief that the witness has information which is pertinent to the issues in the case and which is admissible under applicable rules of evidence, if no privilege were claimed. It is an unfair trial tactic if it appears that counsel calls such a witness merely to get him to claim his privilege before the jury to a series of questions not pertinent to the issues on trial or not admissible under applicable rules of evidence." 365 F.2d at 5.

[11] It is not the function of this Court to determine whether the state courts properly followed the state precedents as long as there is compliance with the constitutional mandates. The Ohio Supreme Court has assumed a position that may be much stricter than that constitutionally demanded. *State v. Dinsio*, 176 Ohio St. 460, 200 N.E.2d 467 (1964). The syllabus reads:

> "In a criminal case, where a claim of a witness because of the privilege of immunity from self-incrimination is properly established, it is error prejudicial to the defendant for the court to permit counsel for the state, by continued questioning of the witness, which questions go unanswered, to get before the jury innuendoes and inferences of facts, conditions and circumstances which the state could not get before the jury by direct testimony of the witness."

[12] On cross examination these two exchanges took place:

> Q. Do you have any source of employment or financial income other than Port Wellington Quarries at the present time?
>
> A. That is it.
>
> * * * * *
>
> Q. The quarries, and nothing else?
>
> A. That is correct. (R. 717.)

has been raised where the defendant had taken the stand. All of the cases have arisen where the state has called a witness knowing that the witness would invoke the privilege or learning that shortly after calling him. The Court is of the opinion that the prosecution's asking of these questions was not such misconduct as to be constitutional error.[13] In reaching this determination the Court has considered the relatively few instances in which petitioner invoked the privilege, the fact that petitioner by his testimony had made the subject relevant, and that fact that petitioner had assumed the stand knowing that he might be asked questions to which he would have to invoke the privilege.[14]

Since the questioning did not constitute constitutional error failure of the court to charge or caution the jury not to draw any inferences from the invocation of the privilege is not material.[15] Thus this allegation provides

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[13] It would be a feat of mental gymnastics supreme to argue that the petitioner was denied the right of cross examination of himself, particularly when this right is founded on the Sixth Amendment right of confrontation.

[14] This is not the same as the imposition of a sanction for invocation of the privilege. See, *Spevack v. Klein*, 385 U.S. 511 (1967); *Garrity v. New York*, 385 U.S. 493 (1967). Here assuming the stand did not in the least waive the privilege. No inferences could be drawn from the invocation of the privilege. However, one of the risks inherent in assuming the witness stand is that the individual may be asked questions which require that individual to invoke the privilege. So long as the questions do not rise to the level of misconduct on the part of the inquisitor, the individual on the witness stand cannot be heard to complain, nor can any other party.

[15] It would appear that the preferred practice is to caution the jury against drawing any inference from the invocation of the privilege in any case where *any* witness invokes the privilege. This despite of the obvious effect of this instruction of drawing attention to the invocation of the privilege. *United States v. Maloney*, 262 F.2d 535 (2d Cir. 1959); cf. *Frazier v. Cupp*, 37 L.W. 4362 (U.S. S. Ct. April 22, 1969). See also, *Namer v. United States*, 373 U.S. 179 (1968).

no basis upon which the Court can grant the relief requested.

As his fifth basis for relief petitioner asserts that the prosecution adversely commented upon petitioner's assertion of the privilege against self incrimination at the time of his arrest.

> "The testimony from Detective Eschweiler is that he and Lieutenant King made an effort to interrogate the defendant after he had been arrested, and they asked him some questions and they told him that he didn't have to say anything if he didn't want to, that was his constitutional right. He told them, then, 'I don't want to say anything until I see my lawyer, and I was sitting there eating in the restaurant alone.'
>
> "We know that was a lie, and he told this lie in the face of his own personal knowledge that Detective Eschweiler was there asking the questions, knew that he was there, because he saw him there when he came over, and Detective Bennett said 'Frank, are you here?' Never once when he took that witness stand did he put on any rebuttal evidence that he didn't say it. Never once in the evidence did any other witness testify that he didn't say that. That statement remains in the record unimpeached, and that statement is a lie, and we all know that it is a lie." (R. 984-85).

The first paragraph is simply a recitation of facts as they had been adduced. An impartial recitation of facts adduced in evidence or which the party expects to adduce in evidence in opening and closing statements does not constitute error even if the facts themselves are prejudicial so long as they are admissible. Cf. *Frazier v. Cupp*, 37 L. W. 4362 (U.S. S. Ct. April 22, 1969). The court properly instructed the jury that these statements were not to be taken as evidence. (R. 1007).

In the context of the argument it is clear that the second paragraph refers to the statement of the petitioner "* * * and I was sitting there eating in the restaurant alone." This was clearly a lie. The petitioner had testified that he was eating with Detective Bennett. The prosecution is trying a case which involves credibility and is making the most of some unrebutted evidence in its favor. Thus this case does not come within the ambit of *Griffin v. California*, 380 U.S. 609 (1965). There is nothing in this allegation upon which the relief requested can be granted.

Petitioner has asserted that the totality of the publicity when coupled with the return of a federal indictment for perjury during the jury deliberations deprived him of a fair trial. The trial court had at the commencement of the case admonished the jury against coming into contact with any publicity regarding the trial. (R. 11-13). Some of the pretrial publicity had been created by the actions of petitioner himself. (R. 710-11).

On December 22, 1965, the morning paper carried an article announcing that petitioner had been indicted for perjury. That same day the court charged the jury as follows:

> "The indictment itself is simply a means created by law for the presentation in a formal way of a criminal charge, and you are instructed that you will not consider the fact that an indictment has been returned as in any way or manner constituting evidence of the guilt of the defendant." (R. 1006).

This Court has thoroughly reviewed the evidence relating to the publicity which this trial received. The Court notes that petitioner never requested a change of venue or the sequestering of the jury. The amount of publicity was not inordinate. This Court has come to the

conclusion that any prejudice caused petitioner by the release of the federal grand jury indictment for perjury was cured by the instruction of the court and that the level of publicity in the community was not such as denied petitioner a fair trial. See, *Shephard v. Maxwell,* 384 U.S. 333 (1966).

Petitioner alleges that Detective Eschweiler suppressed the fact that during the time when he was monitoring the conversation between petitioner and Detective Bennett, his car was involved in an accident which occasioned his absence from the car for several minutes.

Detective Eschweiler did not commit perjury. He was never asked whether he heard the entire conversation or whether he left the car. He testified only as to what he had heard. This testimony was in corroboration of the testimony of Detective Bennett. Detective Eschweiler was absent from the car for only five or ten minutes, so that little of the conversation was missed.

The record is clear that the prosecution knew of this. Yet they chose not to adduce this evidence in testimony. Such action is unpardonable. Unfortunately many attorneys hold the mistaken opinion that the courts are only interested in those facts that they desire to produce. Actually the courts prefer to view the entire picture so that they can discern something which approaches the truth.

Unquestionably suppression of evidence denies an individual due process. It is, for that reason, constitutional error. This Court must determine whether the error is of such dimensions that it will be necessary to grant the writ. The criteria for this determination are established in *Chapman v. California,* 386 U.S. 18 (1967). See also, *Fahy v. Connecticut,* 375 U.S. 85 (1963).

> "Certainly error, constitutional error, * * * casts on someone other than the person prejudiced by it a burden to show that it was harmless. * * * There is little, if any, difference between our statement in *Fahy v. Connecticut* about 'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction' and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. We, therefore, do no more than adhere to the meaning of our *Fahy* case when we hold, as we now do, that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt * * *." *Chapman v. California,* 386 U.S. at 24.

The Court has reviewed the record thoroughly. After such review the Court has come to the conclusion that it is beyond a reasonable doubt that the introduction of this evidence would not have affected the outcome of the case. Therefore the error was harmless.

Since the Court has made an independent determination that the error caused by the suppression was harmless it is not necessary for the Court to consider whether the trial court applied the wrong standard in denying the motion for new trial on the basis of newly discovered evidence.[16]

Petitioner has complained that there was no evidence of one of the elements of the crime presented at the trial. It is his contention that the state did not prove that the money was given intentionally for the purpose of influenc-

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[16] This Court notes that the trial court employed almost literally the language of *Fahy v. Connecticut,* 375 U.S. 85 (1963), in making its determination. Since the court was acting before the decision in *Chapman v. California,* 387 U.S. 18 (1967), it would at best be difficult to say that the trial court did apply the wrong standard.

ing an officer in the discharge of his duty or a witness in the giving of his testimony.

This is basically a question for the jury to decide. There was evidence concerning petitioner's questions regarding the name of the handwriting expert. Also petitioner's statements concerning the fact that Detective Bennett should wheel and deal and that it would be appreciated if the detective were helpful are evidence on this point. The jury was properly charged on the element. (R. 1013). Under this state of facts the Court will not disturb the jury verdict.

Finally petitioner has urged that evidence obtained by illegal electronic invasion of his privacy was introduced in the case. He bases this contention on the case of *Katz v. United States,* 389 U.S. 147 (1967). Since the filing of his petition the Supreme Court of the United States has determined that the rule laid down in *Katz* shall have prospective effect only. *Desist v. United States,* 37 L.W. 4225 (U.S. S. Ct. March 24, 1969); *Kaiser v. New York,* 37 L.W. 4236 (U.S. S. Ct. March 24, 1969). The evidence obtained by an informer wired for sound was clearly admissible under the prior law. *Osborn v. United States,* 385 U.S. 323 (1966); *Lopez v. United States,* 373 U.S. 427 (1963); *On Lee v. United States,* 343 U.S. 747 (1952). Therefore it was properly admissible in this case.[17]

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[17] Even if *Katz* were applicable to this case, the Court is of the opinion that the evidence would still be admissible. This Court is persuaded by the reasoning on the 10th Circuit in *Holt v. United States,* 404 F.2d 914 (10th Cir. 1968). That court reasons that since the testimony for the individual wired for sound would be admissible as to the content of the conversation, *Hoffa v. United States,* 385 U.S. 293 (1966); *Lewis v. United States,* 385 U.S. 206 (1966), the testimony of the individual operating the receiver, and the tape recording itself, is admissible to corroborate that testimony. The reasoning runs that since the defendant took the risk that the person with whom

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Since the Court has found that there is no basis in the allegations of the petition upon which relief can be granted, the petition will be dismissed and an order entered accordingly.

DON J. YOUNG,
United States District Judge.

(Continued from preceding page)

he was speaking would commit the conversation to memory and the latter repeat it, he cannot be heard to complain if that individual employs an electronic aid to this memory.

This comports with the great weight of authority since *Katz*. *United States v. Kaufer*, 406 F.2d 550 (2d Cir. 1969); *Walker v. United States*, 397 F.2d 789 (5th Cir. 1968); *Veley v. United States*, 397 F.2d 788 (5th Cir. 1968); *Dancy v. United States*, 390 F.2d 370 (5th Cir. 1968); *United States v. Jackson*, 390 F.2d 370 (2d Cir. 1968); *State v. Wright*, 444 P.2d 676 (S. Ct. Wash. 1968). Contra. *United States v. Jones*, 292 F. Supp. 1001 (D.C. 1968).

APPENDIX C.

OPINION OF THE COURT OF APPEALS OF CUYAHOGA COUNTY, OHIO, Case Nos. 27,812 and 28,002.

State v. Birns, 10 Ohio App. 2d 103 (1967).

SYLLABUS.

1. The defense of entrapment is not available to a defendant who creates in his own mind (without inducement by another seeking to entrap him into committing an unlawful act) the purpose to commit a criminal act and acts in furtherance of his own purposes. *State vs. Gutilla,* 94 Ohio App. 469.

2. Where the testimony of the defendant clearly supports in almost complete detail the necessary elements of the crime or crimes charged against him, the claim that the verdict is not supported by sufficient evidence cannot be maintained.

3. Where upon trial of a motion for a new trial on the ground of newly discovered evidence, it being claimed that the state suppressed or concealed evidence, which if known to the defendant could have been used to challenge the credibility of a state's witness, and when the court, in overruling such motion, finds that the use of such evidence would not in all reasonable probability require or produce a different result, especially where in such case the defendant's testimony in great part supports and is not in serious conflict with the testimony of the witness whose testimony it is sought to impeach, as well as the testimony of other state's witnesses upon which the defendant was found guilty, it does not constitute error to overrule such motion.

SKEEL, J.

These appeals come to this Court on questions of law from a judgment entered by the trial court on the verdict of a jury finding the defendant guilty on both counts of an indictment charging him with bribery and unlawfully attempting to corrupt a witness in the discharge of his duties as a witness and as an officer of the law in the case of *State vs. Birns* with intent to obstruct and impede or attempt to obstruct and impede the due administration of justice.

The defendant claims the following errors:

1. In repeatedly ruling on evidence and procedure, in making comment prejudicial to the defendant in the presence of the jury, and in invading the province of the jury.

2. In controlling and administering the trial and interpreting the law in contravention of named provisions of the Federal and State Constitutions.

3. and 4. In refusing defendant's request to charge and for errors in the general charge.

5. In prohibiting defendant in defendant's final argument to claim entrapment and the court's failure to give requested charge on that subject.

6. and 7. In overruling defendant's first motion for new trial and for failure to direct a verdict for defendant.

8. and 9. The verdict is contrary to law and is not sustained by sufficient evidence, and, by separate appeal, in overruling defendant's motion for new trial based upon a claim of newly discovered evidence.

The facts as shown by the transcript, the bill of exceptions and exhibits, are that the defendant was arrested on July 23, 1964 at 5715 Brookpark Road in the City of Parma, Ohio, and charged with promoting a numbers

game or lottery known as clearing house in violation of Section 2915.13, Revised Code. The case as thus charged was pending for trial on the merits on November 20, 1964.

On November 20, 1964, the defendant testified he was at the "Beef and Bottle" (a lounge bar in Parma which the record shows the defendant patronized on frequent occasions) having dinner with a girlfriend and upon leaving he saw Detective Bennett seated at the bar. He, the defendant, testified that he had only seen the officer once or twice before, one of which occasions was at the time of his arrest on July 23, 1964. After the defendant recognized the police officer, he engaged him in a conversation for more than a half hour on the subject of gambling. As set out in defendant's brief:

> "There ensued an exchange of conversation and drinks during which the subject of gambling was discussed * * *. Defendant told Bennett that the Cleveland Press ran the requisite information to determine the winners in clearing house but only in editions delivered on the east side of town * * *."

Defendant testified that the officer was amazed to know that he (Birns) was correct in his statement and that the defendant offered to demonstrate the truth thereof by bringing out papers for the officer to examine purchased at several locations. Defendant then arranged that he would call the officer the following week and bring the papers with him to demonstrate the truth of his statement. The meeting was to be at the Beef and Bottle.

The defendant called Detective Bennett at the station house on Monday (November 23, 1964) at about 3:30 P.M. and said he had the newspapers. They agreed to meet at the Beef and Bottle at about 7:45 P.M. Detective Bennett, with Detective Eschweiler, then equipped themselves with sound equipment to record the conversation

between the defendant and Bennett, Eschweiler to listen in his automobile at the side of the restaurant and to attempt to record the conversation on a tape recorder. When the defendant reached the restaurant on November 23 at about 8: 15 P.M., Bennett was sitting at the bar. The defendant testified that they had five, six or seven drinks and that he showed the newspapers to Bennett who was amazed. The defendant expressed his philosophy on the subject of gambling, that is, it was not morally wrong to gamble, and that everybody engages in such conduct. After continuing the conversation, the defendant testified Bennett said:

> " 'You know' he says, 'I have got four and a half or five and a half kids and I'm only making $6500 a year.' "

Defendant further testified:

> "That didn't sound good to me. I thought maybe at that moment, why would he tell me—I'm thinking like this, why would he tell me he has got five and a half kids and making $6500 because there was nothing incriminating said, in all my conversation at the bar and I was wondering about that and I then sent for the waitress to bring a menu because I didn't have dinner yet and when the waitress brought the menu, just trying to be polite, I says 'Mr. Bennett, I am going to eat. Would you care to eat or dine with me?' He said, 'Yes, I would love to.' "

When the salads were on the table, the defendant stated:

> "I went first. Mr. Bennett came about twenty to twenty-five seconds later. He came to the table and sat down. * * * Well when he sat down, then I was thinking about his five and one half kids that he mentioned and only making $6500 a year. I says 'Look, here is a Christmas gift for your family so they

will have a nice Christmas.' He looked at me and he says 'Gee.' He hesitated. He says 'Gee Whiz. What am I supposed to do for this?' I says 'Nothing.' I says 'I wouldn't want you to jeopardize your family or your kids or your job.' "

The defendant testified he laid the two hundred dollars on the table for Bennett. He also testified that after some general conversation that Bennett went to the men's room. After he came back, he laid the money on the table and said "Now, Shon, tell me what you want me to do for this two hundred dollars." The defendant answered "Nothing. I have told you before that I didn't want you to jeopardize your family, your job or your kids." When pressed further as to what was expected of the police officer who, under the circumstances, was not satisfied with defendant's explanation, defendant said "Look, if you can be helpful O.K." After further conversation on this subject. a man walked slowly toward the table and Bennett said "Hello, Frank—are you working tonight?" (This was Eschweiler.) The defendant then testified that all this didn't look good to him. He said "Look, I am getting out of here." He got his coat to leave and was then arrested.

The testimony of the defendant in attempting to explain how he came to give Bennett two hundred dollars (as an alleged Christmas gift on the 23rd of November, with Christmas more than a month away) when he knew that Bennett (an almost total stranger to him) was a potential or probable witness for the State in the numbers case then pending against him, was, with the exception of a few minor details, completely corroborated by Bennett. The officer's testimony on the discussion about his family was to the effect that he had just taken pictures of his children which he displayed to Birns who then in-

quired about his family. Bennett, besides his work as a police officer, was in the photography business with his wife in Parma.

On the state of the record, including Birns' testimony, the issue of the defendant's guilt on either or both charges is clearly supported. The purpose of the defendant in giving one known to him as a police officer who participated in his arrest on a numbers charge, which case was then pending for trial on the merits, it being undisputed that until his arrest, the officer was a total stranger to him, and where there was no indication or the slightest suggestion of solicitation, for one under such circumstances to seek the company of the officer for the purpose of explaining his philosophy on the subject of gambling and without more, give such officer two hundred dollars in cash, with the statement "Look, here is a Christmas gift for your family so they will have a nice Christmas" is sufficient to support a guilty verdict. This evidence being given by the defendant (who has served time in a tax evasion case and in a number of other cases) also disclosed that the officer was taken by surprise when the money was offered, when he, the defendant, testified: "He looked at me and he says 'Gee.' He hesitated. He says 'Gee Whiz. What am I supposed to do for this?' "

On the face of such a record, the defendant's claim of error No. 5 must be overruled, there being no evidence to suggest even entrapment. The court was correct in refusing to charge the law on that subject. Also, for the reasons set out above, claimed errors Nos. 6, 7, 8 and 9 must be overruled.

The defense of entrapment is not available to a defendant who creates in his own mind (without inducement by another seeking to entrap him into committing an unlawful act) the purpose to commit a criminal act

and acts in furtherance of his own purpose. *State v. Gutilla,* 94 Ohio App. 469.

Assignment of error No. 1 is concerned with matters of procedure.

In considering the fact situation, the conclusions reached are based not only on the testimony of Detective Bennett, corroborated by the defendant's testimony, but also that of Officer Eschweiler, who had been assigned to the duty of listening to the conversation between the defendant and Bennett over certain electronic equipment. After the defendant had insisted on carrying on a discourse on gambling with an arresting officer in the numbers case, the police officer involved, either with or without the orders of the Chief of Police of the City, but at least with his knowledge and consent, took steps to use the electronic device of the City for transmitting conversations to others at a distance. Bennett concealed the transmitter on his person and the receiver, with a tape recorder, was placed in Eschweiler's personal automobile which was parked near the Beef and Bottle Restaurant on Pearl Road. The testimony is uncontradicted that the conversation between Birns and Bennett was clearly received and understood by Eschweiler but that the tape recording was garbled and not understandable because of the use of improper equipment. It picked up street noises and the police radio. The jury was permitted to hear the tape with the use of earphones so that they were completely informed as to the conditions of the tape.

One other factor brought out in the record is that when Birns was arrested on July 23rd, there was, in the place where he was arrested, equipment used in conducting a numbers lottery, including tapes and money found in Birns' hat. Such property was not offered or received in evidence in this case. There is no doubt but that Birns

brought into the case the matter of his involvement in numbers operations so that evidence as to the manner in which such a lottery is operated was clearly proper.

On the motion for new trial because of newly discovered evidence, it was disclosed that while Detective Eschweiler was in his private automobile listening to the conversation between Detective Bennett and the defendant, one Donald E. Hale, driving his automobile on Ridgefield Road, ran into and struck the automobile in which Eschweiler was seated listening to the Bennett-Birns conversation. Eschweiler got out of his car, talked with Hale about the damage, and testified that he called the station for an officer to investigate the accident and that Officer Henry Gabriel responded in a very few minutes and took charge of the investigation as is shown by said Officer's activity report filed in the Parma Police Department November 23, 1964.

The basis of this motion for new trial is that the State did not bring the incident of this collision to the attention of the defendant, thereby depriving him of due process. Such claim is based on the alleged fact that since Eschweiler's testimony was corroboratory in character and as the evidence of the defendant tends to show that the accident happened while Eschweiler was listening to Birns and Bennett over the electronic transmitter, and that he left his listening post in his automobile for from twenty-five to forty-five minutes to investigate the accident, if the fact of the accident had not been concealed, it could have been presented to the jury to challenge Eschweiler's credibility. The State's evidence, as shown by many reliable factors, is that Eschweiler did not leave his listening post for a period of time not to exceed five minutes and that the parts of the conversation to which he testified, he had heard over the transmitter. The court, in overruling defendant's motion

for a new trial on the ground of newly discovered evidence, stated that the facts as it found them to be if presented to the jury, would not within reasonable probability cause the jury to come to a different result. The credible evidence on the collision, as shown by the record, clearly supports such result.

One other factor requires this result. The defendant's testimony is not in serious conflict either with that of Bennett who participated in the conversation with Birns or that of Eschweiler who listened over the broadcasting equipment. In addition to what the defendant testified on direct examination, as above set out, he testified on cross-examination as follows:

> "Q. My question is this, sir: When you bought those papers did you buy them so that you could take them to the Beef & Bottle and show them to Detective Bennett?
>
> "A. That is correct.
>
> "Q. That was the only reason—you bought them?
>
> "A. That is right.
>
> "Q. And on the night in question when you came in the Beef & Bottle with those newspapers under your arm, your intention was to show these papers to Bennett and explain them to him with regard to the clearing house digits; is that correct?
>
> "A. I brought those papers out to show him that his area didn't carry it and the other area did.
>
> "Q. I see. At that time did you have any intentions of giving him a Christmas present?
>
> "A. No.
>
> "Q. When you went inside the bar and saw him there at the bar, and discussed with him showing him the manner the number was picked, the stocks and bonds, and so forth, at that time did you have any intention of giving him a Christmas present?
>
> "A. No.
>
> "Q. How much money did you take with you when you went there?

"A. You mean how much money do I carry with me?

"Q. My question is, how much money did you have in your pocket on the 23rd of November, 1964, when you went to the Beef & Bottle to meet Detective Bennett?

"A. Well, I don't recall exactly what I had, but I had money with me.

"Q. Can you approximate how much money you had in your pocket?

"A. I could have had four or five hundred dollars.

"Q. Four or five hundred dollars?

"A. Yes.

"Q. Now, the twenty tens that you gave Detective Bennett, did you have them in a bundle?

"A. I had them with my other money.

"Q. But did you have this separated from your other money?

"A. No, sir.

"Q. Then when you gave Detective Bennett this money how did you know you gave him two hundred dollars?

"A. Well, he wasn't at the table. I proceeded to the table first. It took him about twenty to twenty-five seconds to come back after that, and the only reason I [illegible]one that is when he started telling me that he had four and a half or five and a half kids, and only—emphasized the word 'only'—making sixty-five hundred dollars a year.

"Q. No, my question is this, sir: I believe the testimony is that you threw twenty ten dollar bills to Detective Bennett there at the table. Now, you have told us that you had about five hundred or some odd dollars in your pocket. When did you separate the two hundred dollars that you gave Bennett in the Beef & Bottle, if at all?

"A. Well, I just told you that I got to the table first.

"Q. What did you do when you got to the table first?

"A. I went into my pocket and counted out two hundred dollars.

"Q. I see. In other words, at that point, when you were there at the booth and as Detective Bennett was behind you—

"A. Not as Detective Bennett was behind me. He was at the table yet.

"Q. But you don't know where he was?

"A. He could have been giving a few more signals. I wouldn't know.

"Q. Well, let's understand each other.

"A. I understand.

"Q. You and Detective Bennett were standing at the bar; is that correct?

"A. We were.

"Q. And you left the bar first and went to your booth; is that correct?

"A. I can explain that to you, too. When I got—I'm going to explain it so you understand. I just can't give you a yes answer. I want to explain it.

"Q. Go ahead.

"A. We was at the bar. We had our five or six drinks. I was through having conversation with him at that time. I ordered some food from the waitress, and only out of politeness I asked him would he care to have something to eat. That is all there was. He had not accepted the food you would never have heard anything about this, but before I got to the table he started telling me about his family and his kids, and to me, the way he said it, 'I'm only making sixty-five hundred dollars a year,' to me it looked like a beg.

"Q. I see. At any rate when you left the bar first to go to your booth, that is when you separated the money?

"A. That is when I counted the money out.

"Q. Yes. And you don't know where Detective Bennett was at that time because your attention was directed to counting the money, wasn't it?

"A. No, I didn't see him in my presence. I didn't count the money in his presence because he wasn't there.

"Q. And then when you sat down did you have this money in your hand or had you put it back in your pocket?

"A. I had that money in my hand.

"Q. And you held this money in your hand during the time of the preliminary conversation with Detective Bennett at the booth?

"A. No. Just a minute. When he sat down, the salads are on the table. That is when I took the money and I laid it down on the table. I said, 'This is a Christmas gift for your kids and your wife. See that they have a nice holiday,' because I didn't know he had five and a half kids and only making sixty-five hundred dollars, unless he told me. I thought it was a beg, so I thought it was holiday time, so I says, 'Here, have your family have a nice Christmas.' There was nothing said at the bar in reference to anything incriminating, but when he got the money, that is when all his—the things started."

As thus stated by the defendant, it is clear that the State's case is supported by the defendant's own testimony and upon such evidence, the case was correctly submitted to the jury. The absence of Eschweiler from his listening post for five minutes or less, when the conversation covered a period of time from about 8:15 to 9:30 P.M., was not, upon the record as above stated, a factor preventing defendant from being afforded due process according to law. The motion for a new trial on the ground of newly discovered evidence was, therefore, properly overruled.

For the reasons stated, the judgments are affirmed.

CORRIGAN, *P.J.* concurs.

WASSERMAN, *J.* concurs in the judgment only.